Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1316

FLEX-A-LITE CORPORATION,
*Petitioner,*

*vs.*

SCHWITZER DIVISION, WALLACE-MURRAY CORPORATION,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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FLEX-A-LITE CORPORATION,

*Petitioner,*

*vs.*

SCHWITZER DIVISION, WALLACE-MURRAY CORPORATION,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner, Flex-a-lite Corporation, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 27, 1978.

## ORDER BELOW AND DISTRICT COURT DECISION.

The decision of the Court of Appeals was by unpublished order prohibiting citation. The order appears in the Appendix hereto at pages A. 1-15. A timely motion to publish the order as an opinion of the court (A. 96) was denied. (A. 100) The finding, conclusions and judgment of the District Court for the Southern District of Indiana were unreported but appear in the Appendix at pages A. 16-64.

## JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 17, 1978. A timely petition for rehearing *en banc* (A. 76) was denied on November 27, 1978. (A. 95) This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

1. Did *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974) declare unconstitutional the case law of states which in purely private non-media cases of libel or slander *per se* allow presumed and punitive damages without proof of "actual malice" as defined in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964)?

2. Does a Court of Appeals depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision when it overrules a timely motion to publish its order which, for the first time, holds unconstitutional, law of states comprising its circuit?

3. Does a Court of Appeals depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, when in affirming a Trial Court finding that there was a tortious breach of contract justifying punitive damages, and that slander *per se* was committed, it denies damages allowed below as being "clearly erroneous," and forbids any reconsideration of damages on remand?

## CONSTITUTIONAL PROVISION, STATUTE AND COURT RULES INVOLVED.

1. The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech or of the press; . . ."



2. 28 U. S. C. § 2106, provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

3. Rule 52(a) of the Federal Rules of Civil Procedure provides in relevant part:

> "FINDINGS BY THE COURT. (a) *Effect.* . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

4. Rule 35 of the United States Court of Appeals for the Seventh Circuit: "Publication Rule" is set forth in Appendix at pages A. 101-103.

## STATEMENT OF THE CASE.

### Litigation Below.

Schwitzer Division of Wallace-Murray Corporation, a citizen of New York (hereinafter called Schwitzer) commenced this action against Flex-a-lite Corporation, a citizen of the State of Washington (hereinafter called Flex-a-lite) by filing its complaint on account for $334,211.16, and for consequential damages, in the Superior Court of Marion County, Indiana. The cause was removed to the District Court pursuant to 28 U. S. C. § 1441(a) and 28 U. S. C. § 1332 because of diversity of citizenship. Flex-a-lite counterclaimed for breach of contract and slander. A non-jury trial was had on the complaint and the counterclaim. The parties stipulated that the law of Indiana governed both the contract and slander claims. Schwitzer appealed from the District Court judgment in favor of Flex-a-lite on its counterclaims, which awarded Flex-a-lite damages

totalling $1,107,397. (A. 64) The Seventh Circuit reversed and set aside over 90% of the damage award. (A. 1-15)

**Background Leading to Dispute.**

Flex-a-lite and Schwitzer entered into a contract in 1972, under which Flex-a-lite became Schwitzer's primary agent to market, under Flex-a-lite's name, flexible-blade steel automotive cooling fans manufactured by Schwitzer. (A. 65-75) Schwitzer was one of the largest manufacturers of automotive cooling fans for automobile manufacturers, known as "O. E. M." (original equipment manufacturers). Flex-a-lite, a small corporation, was one of the leading marketers of fiberglass and semi-flexible steel automotive cooling fans to customers other than "O. E. M.", such as wholesale automotive parts distributors, warehouse distributors, automotive air conditioner manufacturers, and discount stores, or what is known in the trade as the "aftermarket". On May 31, 1973, Schwitzer abruptly cancelled the contract and sued Flex-a-lite, following which Schwitzer began competing for the business of Flex-a-lite's customers. Slanders concerning Flex-a-lite's financial stability commenced in September, 1973.

**Slander.**

The District Court found the following false business slanders were widely circulated by Schwitzer (A. 51-54):

> Flex-a-lite was going broke. (A. 52)
>
> Flex-a-lite was insufficiently funded. (A. 52)
>
> Flex-a-lite could not pay its bills. (A. 53)
>
> A Dun & Bradstreet rating on Flex-a-lite was not available. (A. 52)
>
> Flex-a-lite's supplier of fans owned the patents on them and the said supplier was for sale, which would leave Flex-a-lite without a source of supply. (A. 53)
>
> Flex-a-lite was unable to pay for fans, and because of that and because of the lawsuit which Schwitzer had filed, Flex-a-lite would be in no position to supply its customer any more fans. (A. 51)
>
> Flex-a-lite would not be around much longer. (A. 51)
>
> Flex-a-lite was a make-shift operation, operating out of a sort of farmhouse. (A. 51-52)



That these statements were made, and were false, was not contested on appeal.

The District Court further found:

> Flex-a-lite enjoyed increased sales every year from 1966 through 1973—the year the slander began. In 1974 it suffered a $300,000 loss of sales and in 1975 an additional loss of sales of at least $300,000 was indicated. (A. 56)
>
> The slander was particularly harmful to Flex-a-lite because many of its customers issued their own catalogs and were wary of including products of companies which might go out of business. (A. 53)
>
> On hearing the slanders, one company inquired if Flex-a-lite was for sale, another called to inquire if Flex-a-lite was really going broke, another sent an employee from Dallas, Texas, to Tacoma, Washington, to view Flex-a-lite's operation, and an executive of Everco Industries warned his buyer to be careful about buying from Flex-a-lite.[1] (A. 52)
>
> "Schwitzer falsely and maliciously slandered the financial stability of Flex-a-lite with the intent to injure Flex-a-lite, and to obtain for itself sales which would otherwise have gone to Flex-a-lite." (A. 53)
>
> Schwitzer's national aftermarket sales manager "knowingly caused the circulation of false and misleading statements concerning the financial condition of Flex-a-lite." (A. 51)

The Seventh Circuit held that the District Court's finding last quoted above was not a finding of "constitutional malice" as required in *N. Y. Times* v. *Sullivan* (A. 14); that there was no

1. That buyer testified that he was cautious for several months and found alternate sources of supply. (Young deposition, Flex-a-lite Ex. FH, pp. 60-61) Everco's purchases from Flex-a-lite in 1973 had totalled $24,384.00. In 1974, Everco bought nothing. (Flex-a-lite Ex. HI, p. 14)

evidence of "actual injury" to Flex-a-lite (A. 13); and that therefore the compensatory damages found by the District Court were in fact "presumed" damages. The Court held that *Gertz* v. *Robert Welch, Inc.*, prohibits both presumed and punitive damages when "Constitutional malice" is not proved by "clear and convincing evidence." (A. 13-14) In light of those holdings, the Court set aside both the award of $251,088 compensatory damages for slander, and the $250,000 award of punitive damages. In addition, the Court held that since *Gertz* had been in the books more than two years, Flex-a-lite's counsel was derelict in not having presented the issue of "constitutional malice" to the District Court, and, inasmuch as he had full opportunity to do so, there should be no reconsideration of the slander issue on remand. (A. 14-15)

**Breach of Contract.**

On appeal, Schwitzer did not contend that the District Court had, in any respect, erroneously found that it had breached its contract with Flex-a-lite. It did not contend that Flex-a-lite had not suffered damages. It contended that the award for loss of anticipated profits was improper, and was erroneously computed. It also contended that Flex-a-lite's business losses were due to factors unrelated to the contract, and that all damages awarded were based on speculation and were without support in the evidence. Schwitzer further contested the finding that its conduct was so fraudulent as to justify punitive damages.

Of many District Court findings, the following are a few:

> Schwitzer knew at the time it entered the contract it would not have some of the tooling necessary for production before December, 1972, but nevertheless promised production quantities of its fans, including engineering test samples and sales samples, by early October, 1972; and that, in reliance on such false promises, Flex-a-lite signed the contract. (A. 32-33)



Schwitzer knew when it represented its fans had been found to meet "OEM" quality and performance standards, that said representation was false. (A. 40)

Schwitzer "knew at all times—before and after the contract—that the series of full flex fan models in question were defective in being unable to withstand reasonable cyclic durability testing." (A. 44)

While continuing to profess ignorance of design defects in its steel flex fans in the spring of 1973, Schwitzer was in fact verifying the defects in its own laboratory, and knew in detail the nature of the defects. (A. 42)

Flex-a-lite issued a recall notice on eight models of the Schwitzer fans after repeated blade failures were discovered in testing. (A. 39-40)

Flex-a-lite complained of poor paint quality on the Schwitzer fans. Schwitzer's own records show that over 20,000 fans billed to Flex-a-lite, but still stored in Schwitzer's Rolla Warehouse, had bad paint. (A. 38)

The contract set a reasonable marketing goal of 400,000 to 560,000 fans in 1973 and obligated the parties to cooperate in meeting that goal. (A. 32)

Schwitzer failed to provide sample fans to Flex-a-lite for display to prospective purchasers who were determining their 1973 requirements and deciding which fans to display in their own catalogs. (A. 35)

Schwitzer failed to provide specifications of its fans as required by the contract. (A. 35)

Schwitzer failed to provid engineering test samples of its fans. (A. 35)

Schwitzer failed to meet production schedules agreed upon at the time of the contract, and failed to make timely delivery. Schwitzer falsely advised Flex-a-lite of the shipment of 10,000 fans on January 15, 1973, but shipped only 1,060. Shipment by Schwitzer of the orders was not completed until mid-March 1973. (A. 33)

Breach of the contract left Flex-a-lite without products which were currently advertised in its catalogs. (A. 53)

Schwitzer repeatedly double billed Flex-a-lite and continued to do so up to the trial on its complaint. (A. 37)

**Damages Awarded.**

The District Court awarded the following damages to Flex-a-lite:

| Type | Amount |
|---|---|
| Contract-Compensatory | |
| Lost Profits Under Contract | $322,170 |
| Other Business Losses | $376,632 |
| Abnormal 1973 Expenses by Reason of Contract Failure | $ 8,595[2] |
| Contract-Punitive | $150,000 |
| Slander-Compensatory | $251,088[3] |
| Slander-Punitive | $250,000 |

**Damages Set Aside.**

The Seventh Circuit's unpublished order, after first noting that the issues on appeal related only to damages, set aside, in their entirety, four of the five contested damage awards and prohibited any further consideration of those types of damages by the District Court. The Court ordered a remittitur as to the only remaining contested damage award.

2. This item of damages, as well as an award to Schwitzer of $12,194.35 (for fans sold by Flex-a-lite which could not be returned to Schwitzer) were not in issue on appeal.

3. This award was not included in the judgment. The District Court merged it with the compensatory contract damages, in accord with the finding, "Where, as here, a corporation has suffered loss of business because of slander; sale and recall of defective products, and breach of contract which leaves it without products advertised in its catalog, and with a severely damaged reputation, it is impossible to accurately say what portion of the damage is attributable to the slander, as opposed to the breach of contract or the sale and recall of defective merchandise." (A. 53)



The Seventh Circuit result may be summarized as follows:

| Category of Damages Awarded by District Court and Contested on Appeal | District Court Awards | Seventh Circuit Grounds for Reversal | Seventh Circuit Order |
|---|---|---|---|
| Contract—Compensatory | | | |
| Lost Profits Under Contract | $322,170 | Clearly erroneous and insufficient evidence | Set aside and further consideration on remand prohibited |
| Other Business Losses | $376,632 | Clearly erroneous and insufficient evidence | Set aside and further consideration on remand prohibited |
| Contract—Punitive | $150,000 | Erroneous and insufficient evidence | $50,000 remittitur ordered and proceedings on remand limited |
| Slander—Compensatory | $251,088[4] | *Gertz* standards not met | Set aside and further consideration on remand prohibited |
| Slander—Punitive | $250,000 | *Gertz* standards not met | Set aside and further consideration on remand prohibited |

**REASONS FOR GRANTING THE WRIT.**

**1. The Decision Below Conflicts with the Decisions of Highest State Courts, and Constitutes the First Extension of Gertz to Purely Private Defamation per se by a United States Court of Appeals.**

There is manifest nationwide conflict as to whether in cases of defamation by a private person against a private person, *Gertz* invalidates state laws which allow, in cases of libel or slander *per se*, compensatory damages without proof of special harm, and punitive damages, where malice is present in the traditional sense, but "actual malice" as defined by *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), is absent.

Here, the Court of Appeals held that *Gertz* prohibited such damages. This places the Seventh Circuit in conflict with the highest courts of Colorado, Wisconsin and Oregon.

4. Excluded by District Court from judgment, thus merging slander compensatory with contract compensatory damages.

The Colorado Supreme Court *en banc* in *Rowe* v. *Metz*, ..... Col. ....., 579 P. 2d 83 (1978), reinstated a jury verdict of presumed and punitive damages. The Court held that *Gertz* does not apply to a private plaintiff against a non-media defendant for a defamation essentially private in nature.

The Supreme Court of Wisconsin, a Seventh Circuit state, in affirming awards of compensatory and punitive damages in *Calero* v. *Del Chemical Corporation*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975), held that *Gertz* had no application because First Amendment protection does not extend to purely private libel.

In *Harley-Davidson Motor Sports, Inc.* v. *Markley*, 279 Or. 361, 568 P. 2d 1359 (1977), the Oregon Supreme Court affirmed awards of general and punitive damages where the Trial Court had instructed the jury that it could presume damages if it found libel had occurred. The Oregon Supreme Court held that the First Amendment protection accorded the media in *Gertz* does not extend to non-media defendants where no public official, public figure or issue of public concern is involved, and that Oregon law applies. Accord, *Adams* v. *State Farm Mutual Automobile Ins. Co.*, 283 Or. 45, 581 P. 2d 507, 511 (1978).

The Court of Appeals for the Third Circuit in *Grove* v. *Dun & Bradstreet, Inc.*, 438 F. 2d 433 (3rd Cir. 1971), *cert. denied*, 404 U. S. 898 (1971), held that the knowledge of falsity standard of *New York Times* v. *Sullivan*, 376 U. S. 254 (1974), did not apply where Dun & Bradstreet had issued an inadvertently false, private-subscription, credit report.

This Court in *Virginia State Board of Pharmacy* v. *Virginia Consumer Council*, 425 U. S. 748, 771 (1976), two years after its decision in *Gertz*, seemingly approved the Third Circuit's refusal to require the meeting of the *constitutional malice* standard by inviting comparison of its denial of certiorari in *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898 (1971), with its decision



in *New York Times* v. *Sullivan, supra. Virginia State Board of Pharmacy* v. *Virginia Consumer Council, supra*, at 771, n. 24.

This Court further stated in *Virginia State Board of Pharmacy, supra*, at 771-772:

> "The First Amendment, as we construe it today, does not prohibit the state from insuring that the stream of commercial information flow cleanly as well as freely."

In *Mid-American Food Service, Inc.* v. *ARA Services, Inc.*, 578 F. 2d 691, 697 (8th Cir. 1978), the Eighth Circuit declined to state an opinion on the applicability of the Supreme Court media defamation cases to a non-media fact situation. The Court stated at page 697, n. 5:

> "By its terms the Supreme Court's decision in *Gertz* was predicated on an accommodation of the competing interests of freedom of the press and an individual's right to compensation for a wrongful injury. 418 U.S. at 343, 93 S.Ct. 2997. A similar balancing would necessarily precede any extension of the *Gertz* standards to embrace defamation by the spoken or written word in which there is no media involvement."

The foregoing seems to constitute a declaration by the Eighth Circuit that it would not extend *Gertz* to non-media cases in the absence of a Supreme Court decision declaring such extension to be the law.

In *Weenig* v. *Wood*, ..... Ind. App. ....., 349 N. E. 2d 235 (1976), *transfer to Indiana Supreme Court denied*, a slander case between two private persons, the Indiana Court of Appeals followed traditional Indiana law to the effect that slander of another's business is slander *per se;* that damages presumed to flow from such defamation may be recovered without proof of special damages; and that malice in the common law sense justified punitive damages. "Constitutional malice", as defined by *New York Times* v. *Sullivan*, was not shown.

The Court, in *Weenig*, declined to consider a claim of conditional privilege under the First Amendment, because it was first raised in the reply brief, and "it would be at best intemperate to

speak to the complex constitutional questions belatedly raised with only one side of the issues argued." *Weenig, supra,* at 248. The Court did show its awareness of *Gertz* by referring the reader in a footnote to *The American Law of Defamation Through Gertz* v. *Robert Welch, Inc., and Beyond: An Analytical Primer,* 61 Va. L. Review 1349, 1403-1408, 1412-1419 (1975). *Weenig, supra,* at 248, n. 3.

In direct opposition to the positions of Colorado, Wisconsin and Oregon, but in accord with the Seventh Circuit position, the Court of Appeals of Maryland in *Jacron Sales Co., Inc.* v. *Sindorf,* 276 Md. 580, 350 A. 2d 688 (1976), held that the *Gertz* standards apply to non-media defendants, as well as media defendants, regardless of whether the slander involves a public official or question of public interest. The Court held that both presumed and punitive damages were prohibited by *Gertz* in absence of proof of knowledge of falsity or reckless disregard for the truth. Accord, *International Brotherhood of Electrical Workers, Local 1805* v. *Mayo,* 281 Md. 475, 379 A. 2d 1223 (1977); *Marchesi* v. *Franchino,* ..... Md. ....., 387 A. 2d 1129, 1131 (1978).[5]

Comment *e* of the *American Law Institute Restatement of Torts Second,* § 580B, Vol. 3, p. 225 (1976) concedes that *Gertz,* by its words, applies only to a statement made by the media, but argues for extension of the *Gertz* standard of fault to all private defamation cases.

In the instant case, the Seventh Circuit held the District Court's finding that plaintiff had proved its damages "by a preponderance of the evidence" was insufficient in that it did not find that "constitutional malice" had been proved by "clear and convincing evidence" as required by *New York Times* v. *Sullivan,* 376 U. S. 254 (1964). (A. 14)

5. The Minnesota Supreme Court, while postponing resolution of the question of the applicability of *Gertz* to private defamation in Minnesota, has noted the conflict between Maryland and Wisconsin. *Anderson* v. *Kammeier,* ..... Minn. ....., 262 N. W. 2d 366, 372 (1977).



Yet, the *Restatement of Torts Second* § 580B, Comment *j,* Vol. 3, p. 229, states:

> "There has been no indication that proof of fault in the ordinary defamation case must meet the unusual standard of 'clear and convincing proof' that the Supreme Court has held to be required in showing knowledge or reckless disregard as to falsity in an action by a public official or a public figure. (See § 580A, Comment f). It seems doubtful that this requirement will be imposed in the application of the rule set forth in this Section."

It is respectfully submitted that the extent of application to be given to *Gertz* is a recurrent problem of vital importance to all lower State and Federal Courts considering cases of purely private defamation.

The Statement of the Case on the defamation issue demonstrates that this case is a proper vehicle for this Court to provide the needed guidelines.

**2. Denial of Timely Motions to Publish Legally Important Court of Appeals Decisions Deprives Citizens of Assuance of Uniform Application of the Law.**

The Seventh Circuit, in a 15 page unpublished order forbidding its citation (A. 1-15), held in this case that *Gertz* prohibited, on constitutional grounds, presumed or punitive damages for slander *per se* in a non-media, purely private, defamation case between two corporations, in the absence of proof by "clear and convincing" evidence of "actual malice" as defined in *New York Times* v. *Sullivan,* 376 U. S. 254 (1964). It has never before made such a holding unless it, too, was by an unpublished order, nor has any other United States Court of Appeals. None of the highest Courts of Indiana, Iliinois or Wisconsin had ever so held. To the contrary, Indiana is still awarding presumed and punitive damages in such cases without imposition of the *New*

*York Times* standard of proof;[6] and the Supreme Court of Wisconsin has expressly held *Gertz* inapplicable to such cases.[7]

Rule 35(c) of the Seventh Circuit (A. 101) clearly requires publication of an opinion "in appeals which: (1.) Establish a new or change an existing rule of law." (A. 102)

The obvious need of the U. S. District Courts and the Courts of the States to know that their United States Court of Appeals has held their prevalent practice in private defamation cases unconstitutional, should render it mandatory that such a decision be published, even were there no rule requiring it. Otherwise, the function of the Court of Appeals in furnishing definitive guidelines for the District Courts becomes inoperative, and the failure to publish becomes a trap, which will induce those Courts to follow traditional state law, not knowing it has been found unconstitutional.

Equally important is the inherent fact that when a Court of Appeals refuses publication and forbids citation of a decision, which would otherwise stand alone as a judicial precedent, it leaves itself free in the future to arrive at a diametrically opposite decision on a basically identical fact situation. This possibility, in and of itself, strikes at the integrity of a judicial system charged with uniform application of the law.

### 3. The Setting Aside of the Damage Awards, Without Any Meaningful Opportunity for Further Consideration in the District Court, Presents Important Questions of Federal Law, and So Departs from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

#### A. Clearly Erroneous Test Misapplied.

The Seventh Circuit reversed the District Court not only for what it perceived to be erroneous application of the law (not

6. See *Weenig* v. *Wood*, ..... Ind. App. ....., 349 N. E. 2d 235 (1976).

7. See *Calero* v. *Del Chemical Corporation*, 68 Wis. 2d 487, 228 N. W. 2d 737 (1975).



applying *Gertz* standards), but also for erroneous findings of fact upon which the damage awards were based.

The Seventh Circuit could not properly set aside findings of fact "unless clearly erroneous," after giving "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses." Rule 52(a), Fed. R. Civ. P. The Seventh Circuit cases applying this principle are, of course, legion. See *e.g.*, *The Sirius Star* v. *Sturgeon Bay Shipbuilding & Dry Dock Co.*, 196 F. 2d 479 (7th Cir. 1952); *Alster* v. *Alster & Associates, Inc.*, 319 F. 2d 54 (7th Cir. 1963); *Aunt Mid, Inc.* v. *Fjell-Oranje Lines*, 458 F. 2d 716 (7th Cir. 1972).

The Seventh Circuit has, prior to the decision here, been very hesitant to set aside District Court findings and has taken "that view of the evidence and the inferences deducible therefrom which is most favorable to the . . . [party prevailing below]." *Aunt Mid, Inc., supra*, quoting *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 139 F. 2d 416, 417-418 (8th Cir. 1943).

Here, the Seventh Circuit departed completely from usual standards. The Court simply adopted the view of the evidence and inferences most favorable to Schwitzer in reviewing disputed facts and ignored undisputed facts favorable to Flex-a-lite, as set out above in the Statement of the Case.[8] If the Court had applied the "clearly erroneous" test correctly and consistently with its usual respect for the District Court's findings, the damage findings could not have been found to be so unsupported by evidence as to be clearly erroneous. Contrast, *e.g.*, the Seventh Circuit's order here with the deference afforded the District Court's findings in *Aunt Mid, Inc.* v. *Fjell-Oranje Lines*, 458 F. 2d 712 (7th Cir. 1963). Contrast the Seventh Circuit's refusal here to permit reasonable inferences of causation with this Court's application of the clearly erroneous rule to causation in *McAllister* v. *United States*, 348 U. S. 19, 22-23 (1954).

8. Flex-a-lite's petition for rehearing pointed to testimony and exhibits supporting the findings which the Seventh Circuit overlooked or improperly disregarded. (Petition, A. 76)

**B. Improper Prohibition of Further Proceedings.**

Taken alone, the Seventh Circuit's holding that findings on damages were clearly erroneous might not merit the exercise of this Court's jurisdiction. Taken together with the Seventh Circuit's disposition of the case, however, the result is so arbitrary and contrary to the accepted and usual course of judicial proceedings as to call for review by this Court. The Seventh Circuit did not merely disapprove the findings as written, but set aside all the slander damages and nearly all the contract damages, then prohibited any meaningful reconsideration upon remand.[9]

Section 2106, Title 28, United States Code, (62 Stat. 963) provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

This Court has often held that, in the exercise of its appellate jurisdiction, it may not only correct errors of law, but also make such disposition of the case as justice requires. See, *e.g., State of Minnesota* v. *National Tea Company*, 309 U. S. 551, 555 (1940).

Where a judgment is reversed for erroneous application of the law, inadequate findings, or insufficient evidence, the usual course taken to serve the ends of justice has been to remand the cause for further findings on the evidence, for additional evidence, or for a new trial on damages, liability, or both. See, *e.g., Malot* v. *Riddell*, 383 U. S. 569 (1966); *Florida Lime and Avocado Growers, Inc.*, v. *Paul*, 373 U. S. 132, 152-156 (1963); *Stewart* v. *Southern Railway Co.*, 315 U. S. 283, 285-

9. Only with respect to the remittitur of $50,000 of the contract punitive damages was some further consideration permitted, the scope of which would apparently be limited to further reducing the award. (See Order, A. 15)



286 (1942); *Magenau* v. *Aetna Freight Lines, Inc.*, 360 U. S. 273 (1959); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966).

Here, the Seventh Circuit's refusal to permit further findings or a new trial on the contract damages was apparently predicated on the claimed absence of sufficient evidence in the record. (A. 6-7) Its refusal to permit any further findings or trial of slander liability and damages was based upon the Court's feeling that Flex-a-lite should have advised the District Court to extend *Gertz* standards to this purely private defamation case, and should have tailored its slander evidence to those standards —even though no United States Court of Appeals or Indiana appellate case had yet done so. (A. 14-15)

*Rosenblatt* v. *Baer*, 383 U. S. 75 (1966), is particularly pertinent. There, as in the Seventh Circuit here, the Court held a stricter defamation standard should be applied than had been applied in the Trial Court. The Court recognized that if the stricter standard had been applied, the plaintiff might have adduced additional proof to meet the standard, and "we should not foreclose him from attempting retrial of his action." *Rosenblatt* v. *Baer, supra*, at 87-88.[10]

To condone the result required by the Seventh Circuit here would seriously damage the integrity of the judicial process and undermine the confidence citizens should have that Federal Courts will adjudicate claims fully and fairly.

Consider the context in which the Court of Appeals Order was issued. Schwitzer went to the Seventh Circuit as an admitted wrongdoer, having fraudulently breached its contract with Flex-a-lite, wrongfully sued Flex-a-lite, and circulated false statements about Flex-a-lite (slander *per se* under Indiana law),

10. *Accord, Associated Press* v. *Walker*, 388 U. S. 130, 162, 170, 172 (1967); *Greenbelt Cooperative Publishing Assn. Inc.* v. *Bresler*, 398 U. S. 6, 15 (1970); *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 277 (1971); *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971); *Ocala Star-Banner Co.* v. *Damron*, 401 U. S. 295, 301 (1971). The separate dissenting opinion of Justices Black and Douglas in *Monitor, Time*, and *Ocala*, 401 U. S. 642, points out that new trials were permitted in those cases.

while trying to appropriate the after market business formerly enjoyed by Flex-a-lite.

Flex-a-lite went to the Seventh Circuit as a small, but formerly profitable corporation, which had sustained grave losses. A federal trial judge, after a lengthy trial with scores of witnesses and hundreds of exhibits, had found the losses were caused by Schwitzer's misconduct, and the wrongdoing was so serious as to merit substantial punitive as well as compensatory damages.

If the Seventh Circuit Order were to remain uncorrected, Schwitzer would be left unpunished and Flex-a-lite uncompensated. The cost to Schwitzer would be less than it would have cost to perform its obligations under the contract, and the compensation to Flex-a-lite little more than the cost of defending itself in the wrongfully instituted litigation.

The grave implications of such a result for other potential litigants in the federal courts make it important for this Court to review the Seventh Circuit decision.

**CONCLUSION.**

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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February 26, 1979.

# Appendix

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued February 28, 1978)

Unpublished Order Not To Be Cited Per Circuit Rule 35

September 27, 1978

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. THOMAS R. MCMILLEN, *District Judge**

SCHWITZER DIVISION, WALLACE-MURRAY CORPORATION,
*Plaintiff-Appellant,*

N. 77-1871 *vs.*

FLEX-A-LITE CORPORATION,
*Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 73-C-312

—

Cale J. Holder,
*Judge.*

ORDER

The plaintiff appeals from a judgment entered on defendant's counterclaims awarding substantial damages for breach of contract and defamation. The principal issues relate to the sufficiency of the evidence with respect to the damages awarded. We reverse the judgment in part and affirm it in part.

* The Honorable Thomas R. McMillen, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

The agreement at issue provided for the sale by Schwitzer to Flex-a-Lite of steel fans of two types: flexible steel fans, referred to in the agreement as "flex fans" (Agreement par. 1); and rigid steel fans, referred to in the agreement as "spider fans" (Agreement par. 2). Paragraph 9 of the agreement provided:

> The goods supplied by Schwitzer are warranted to be free of defects in material and workmanship for a period of one hundred and twenty days (120) from the date of purchase by the ultimate consumer. Schwitzer's liability under this warranty shall be limited to repair or replacement, at Schwitzer option, of any goods found to be defective by Schwitzer inspection. SCHWITZER SHALL NOT BE LIABLE FOR CONTINGENT OR CONSEQUENTIAL DAMAGES.

(Emphasis in original.) Flex-a-Lite had been marketing fiber glass automotive fans in the automotive aftermarket for some time, but it had not previously marketed steel fans. The agreement provided that Flex-a-Lite was to be Schwitzer's primary national distributor for aftermarket sales of flexible steel fans and Schwitzer's secondary national distributor for sales of spider fans in that market. Instead of providing for specific quantities to be sold, the agreement provided (par. 4),

> Both parties agree to the timely development of promotions, administration, marketing and production requirements to accommodate marketing of between 400,000 and 560,000 units during the calendar year 1973. Within one month from date of this agreement, Flex-a-Lite agrees to provide Schwitzer with a blanket purchase order and an estimated delivery schedule for the calendar year 1973. . . .

After a series of difficulties and misadventures, the parties' relationship ended, and this litigation ensued. Only flex fans are involved. Flex-a-Lite's claim does not assert any wrongdoing with respect to spider fans, and the trial court found there was no issue relating to such fans.

The action commenced with Schwitzer's filing of a complaint for breach of contract in an Indiana state court. Flex-a-Lite



removed the case to the federal court under 28 U. S. C. § 1441, and there filed a counterclaim for breach of the same contract, and for defamation. After a lengthy (2680 pages of transcript and four large boxes of exhibits) trial without a jury, the court found against Schwitzer on its contract claim and in favor of Flex-a-Lite on its counterclaim. The court found that Schwitzer had breached the contract by failing to make timely delivery, by delivering defective fans, and by shipping incorrect quantities of fans to Flex-a-Lite's customers. In addition the court found that Schwitzer had defamed Flex-a-Lite. Damages were awarded for both breach of contract and defamation.[1] The issues on appeal relate only to damages.

## I.

## CONTRACT DAMAGES

The trial court awarded damages of $857,397 on Flex-a-Lite's contract claim. This amount included (1) $376,632 based on Flex-a-Lite's decline in overall profitability after January 1, 1973, without regard to expected profits under the Schwitzer contract; (2) an additional $322,170 based on Flex-a-Lite's loss of its anticipated profits under the Schwitzer contract; (3) $8,595 for expenses incurred by Flex-a-Lite incidental to the Schwitzer breach; and (4) $150,000 in punitive damages, based upon a finding that the breach was accompanied by fraud and malice. Schwitzer attacks items (1), (2), and (4).

---

1. Schwitzer's brief in this court asserts that Flex-a-Lite's proposed findings of fact were adopted "virtually verbatim" by the District Court. Flex-a-Lite does not dispute this assertion, and its accuracy is confirmed by an almost impenetrable prolixity in the findings which we would not be willing to attribute to the trial court. We of course accept the proposition that the court approved these findings and treat them accordingly, but we say again, as we have in other cases, that to the extent that a District Court uncritically adopts partisan, argumentative findings composed by prevailing counsel, the purpose of Rule 52(a), Fed. R. Civ. P., is defeated and effective review by this court is made more difficult.

A.

Damages Awarded for Decline in Overall Profitability

The trial court found that in the five years preceding 1973, the year in which the contract was entered into and subsequently breached, Flex-a-Lite had averaged net operating profits of $77,200. The court next

> "inferred from the evidence that had there been no contract with Schwitzer, Flex-a-Lite would have made a minimum operating profit of $77,200.00 in each of the years 1973, 1974 and 1975—or a total for the three years of $231,600.00."

The court then noted that the average losses suffered by Flex-a-Lite were $48,344 for 1973 and 1974, and it also inferred that the 1975 net operating costs "will be at least as great." Accordingly, the court found that the total losses suffered from 1973 to 1975 were $145,032. Adding the losses suffered to the profits Flex-a-Lite would have made in these three years, the trial judge awarded $376,632 as one element of damages caused by Schwitzer's breach of contract.

We hold that this finding was clearly erroneous. We have searched the record in vain for any evidence that supports the finding that Flex-a-Lite's decline in overall profitability was caused by Schwitzer's breach. Indiana (whose law is stipulated by the parties to be applicable under *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938); see also *Stanish* v. *Polish Roman Catholic Union of America*, 484 F. 2d 713, 723 (7th Cir. 1973), follows the universal rule that plaintiff must demonstrate both the cause of the loss and the amount of the loss. *Lowe* v. *Turpie*, 147 Ind. 652, 44 N. E. 25 (1896); *American Fletcher National Bank & Trust Co.* v. *Flick*, 146 Ind. App. 122, 252 N. E. 2d 839 (1969); *Jerry Alderman Ford Sales, Inc.* v. *Bailey*, 154 Ind. App. 632, 291 N. E. 2d 92 (1972). Flex-a-Lite's argument that the "trial court's calculation of lost profits was very conservative" misses the point. This argument is



relevant to the amount of damages, an issue that arises only if causation is established.

The testimony of Flex-a-Lite's president that, in his opinion, Schwitzer's breach must have been a cause of his company's decline is not adequate to establish causation. In point is the observation of the court, speaking through Judge Hastings, in *Mercury Cleaning Systems* v. *Manitowoc Engine Corp.*, 255 F. 2d 318, 322 (7th Cir. 1958):

> We fail to find in the record any evidence showing that plaintiff's business decline in 1954 was caused by defendants' alleged breach of warranty in not sealing the valve in question or properly testing the machines for leakage, except the isolated self-serving statement of plaintiff's president that they "judged it [the business decline] to be [the result of] the reputation that our unit had for excessive leakage. . . ." We need cite no authorities to support the proposition that there must be established a causal connection between plaintiff's loss in 1954 and defendants' alleged breach of warranty.

Also pertinent is the observation of the Indiana Supreme Court in *Connersville Wagon Co.* v. *McFarlan Carriage Co.*, 166 Ind. 123, 132, 76 N. E. 294 (1905):

> Men are often most sanguine concerning the successful conclusion of their business ventures, and can usually show on paper how large profits must be the result of their undertaking. Unfortunately, however, it is a matter of common occurrence that schemes which prudent, cautious and experienced business men had formulated with the utmost care fail in the accomplishment of the expected rewards.

In the instant case, the evidence not only failed to show causation but showed without contradiction events unrelated to the contract that must have contributed substantially to Flex-a-Lite's overall decline in profitability. For example, Flex-a-Lite lost its principal account, Nissan, in 1973 for reasons not legally attributable to Schwitzer. Flex-a-Lite also lost a number of very important employees between late 1972 and the middle of 1973,

again for reasons which had nothing to do with Schwitzer's breach. Also, Flex-a-Lite's costs of doing business were rising faster than its sales, and no evidence was adduced to show that the increased costs were attributable to the Schwitzer account. Indeed, the increase in costs relative to the increase in sales manifested itself long before the contract at issue was entered into. Thus, although sales increased in each year between 1970 and 1972 (the three years preceding the contract), Flex-a-Lite's net profitability was declining:

| | 1970 | 1971 | 1972 |
|---|---|---|---|
| Sales | $1,162,186 | $1,473,619 | $1,637,755 |
| Net Operating Income | $ 139,510 | $ 79,532 | $ 49,669 |

Because the evidence does not support the finding that Schwitzer's breach was the cause of Flex-a-Lite's overall decline in profitability for the years 1973 through 1975, the award of $376,632 in damages for decline in overall profitability is set aside. Flex-a-Lite having had an ample opportunity to prove damages on its theory and having failed, it is not entitled to another opportunity.

B.

Damages Awarded for Loss of Anticipated Profits on the Schwitzer Contract

In awarding $322,170 in damages based on the profit which it calculated Flex-a-Lite would have made under the contract, if the contract had been performed, the trial court relied on evidence which included Flex-a-Lite's expected profits from the sale of spider fans in addition to the profits Flex-a-Lite expected to make on flex fans. Yet Schwitzer was found to have breached only that portion of the contract relating to the sale of flex fans. This error is apparent from a tracing of the calculations by which the trial judge arrived at the $322,170 figure. His findings recited that "if . . . 560,850 fans" had been sold, "this would



substantiate a figure of $451,039.00 as the amount of net profit Flex-a-Lite would have earned from such sales." These figures had to come from an exhibit prepared by the cost-accountant called by Flex-a-Lite as an expert witness, which shows that the 560,850 figure included some 230,000 spider fans. Obviously, Flex-a-Lite was not entitled to damages for lost profits on the foregone spider fan sales.

The calculation suffers from other flaws. The contract merely provides that "Both parties agree . . . to accommodate marketing of between 400,000 and 560,000 units during calendar year 1973." (Agreement par. 4.) The evidence adduced at trial dealing with the quantity of flex fans agreed to be sold *to Flex-a-Lite* is conflicting. The trial judge never found how many fans Schwitzer was obligated to sell to Flex-a-Lite.

These errors, however, are subsumed by an error that affects the entire $322,170 award. The finding of the trial court that Flex-a-Lite would have sold 400,000 flex fans to its customers is clearly erroneous, apart from the fact that the number necessarily includes spider fans. Flex-a-Lite's argument that this projection is supported by the Dallas market projection is simply incorrect. That projection did not purport to establish Flex-a-Lite's sales, but rather the overall needs of the Dallas market. We find no other evidence that supports the 400,000 figure or any other figure. The award of $322,170 is therefore set aside. As in the case of the damage theory discussed in Part A, above, Flex-a-Lite had its trial and failed to prove damages in the form of loss of anticipated profits, and is not entitled to another attempt to make its proof.

C.

The Contract Provision Excluding Consequential Damages

Schwitzer asserts as an alternative reason for reversal of the awards of damages for lost profits considered in parts I, A and I, B above the last sentence of paragraph 5 of the contract, which provides that consequential damages should not be re-

coverable. This would indeed be a sound argument, *V-M Corp.* v. *Bernard Distributing Co.*, 447 F. 2d 864 (7th Cir. 1971), if it had been raised.[2]

Flex-a-Lite argues that the point was waived because it was not asserted in the District Court. Schwitzer responds that it relied on this point in its proposed findings of fact and conclusions of law in that court, but those proposed findings and conclusions are not in the record before us. The court's incorporation of the entire contract in its findings and conclusions does not show the point was argued, notwithstanding *United States ex rel. H & S Industries* v. *Rich*, 525 F. 2d 760, 767 (7th Cir. 1975). Schwitzer has not preserved error on this alternative argument.

D.

Punitive Damages Awarded for Schwitzer's Breach

The court awarded Flex-a-Lite $150,000 in punitive damages. This award was predicated on the following finding:

> That at that time and during the course of the contract, before its repudiation, Schwitzer made such false misrepresentations which were relied upon by Flex-a-Lite to its damage; and the Court finds that exemplary damages should be awarded to punish Wallace-Murray Corporation for the wrongful conduct of its Schwitzer Division; to deter it from such fraudulent conduct in the future; and to serve as an example to others who might, if Wallace-Murray Corporation were to go unpunished, be tempted to engage in similar conduct. . . .

2. Because this provision appears in an uncaptioned paragraph of the agreement that also deals with warranties, we would have been willing to assume that it did not apply to damages flowing from failure to deliver on time or delivery of wrong quantities, as distinguished from defects in the goods. There is no basis in the evidence, however, for determining how much, if any, of the damages flowed from breach of delivery obligations rather than from defective quality, so Flex-a-Lite's damage proof would be held to have failed for this additional reason if Schwitzer had preserved the error.



Although the antecedent of the second "that" is indefinite, the reference apparently is to the time the contract was entered into. This is confirmed by Flex-a-Lite's brief, in which counsel who appears to have authored the findings adopted by the court argues that the award of punitive damages is supported both by evidence of fraud at the time the contract was entered into and during the time of performance. Schwitzer asserts that there is no evidence in the record upon which the trial court could have found that Schwitzer's misrepresentations at the time of contracting were knowingly made. Punitive damages are recoverable under Indiana law "whenever the elements of fraud, malice, gross negligence or oppression mingle in the controversy." *Hibschman Pontiac, Inc.* v. *Batchelor*, ..... Ind. ....., 362 N. E. 2d 845, 847-848 (1977), quoting from *Vernon Fire & Casualty Insurance Co.* v. *Sharp*, 264 Ind. 599, 349 N. E. 2d 173, 180 (1976), which in turn quotes from *Taber* v. *Hutson*, 5 Ind. 322, 325 (1854). However, when the amount awarded as punitive damages is based in part upon conduct that is not a proper basis for such damages, the award cannot stand in its entirety.

The evidence of Schwitzer's fraud during the performance stage of the contract, although not overwhelming, is sufficient to support an award of punitive damages. Carroll Turk's letter of April 6, 1973, written in response to Flex-a-Lite's complaints during March, contains statements of fact (*e.g.*, the fans designed for Flex-a-Lite "were designed to meet OEM requirements . . .") on which Flex-a-Lite reasonably could have relied to its detriment. There was evidence from which the court could have inferred that this statement in fact was relied upon by Flex-a-Lite, and that the misstatement was knowingly made.

To the extent that the punitive damages were based on a finding that Schwitzer engaged in fraudulent conduct in connection with the making of the contract, however, they are erroneous. There is no evidence from which it could reasonably be inferred that Schwitzer intended to inflict injury upon Flex-a-

Lite at the time of contracting, knew that its fans would be defective or would fail to meet specifications, acted with gross negligence, or otherwise acted oppressively. An Indiana court has power to order a remittitur when it considers the amount awarded by a jury to be unreasonable. *See Hibschman Pontiac, Inc.* v. *Batchelor, supra,* 362 N. E. 2d at 849. In that case the court quoted from *City of Indianapolis* v. *Stokes,* 182 Ind. 31, 105 N. E. 477 (1914):

> Damages are not [to be] considered excessive unless at first blush they appear to be outrageous and excessive or it is apparent that some improper element was taken into account by the jury in determining the amount.

Here the trial court, as the trier of fact, considered an erroneous element in determining its award of punitive damages to Flex-a-Lite. From our examination of the record, we conclude that a reduction in the amount of $50,000 would be appropriate because of this error. The case will be remanded to the trial court with instructions to order a remittitur of $50,000 and, if the remittitur is not made by Flex-a-Lite, to reconsider the award of punitive damages in light of our holding.[3]

## II.

## DEFAMATION

Flex-a-Lite in the second count of its counterclaim, sought damages for defamatory statements uttered by Jerome Krug, Schwitzer's National Aftermarket Sales Manager. Although Krug denied making most of the statements, Schwitzer does not attack the trial court's finding that he did ~~not~~ make them. (*Sic*) The court found that Krug, at various times and to different people, had stated (1) that Flex-a-Lite was not "financially strong"; (2) that after Schwitzer's law suit against Flex-a-Lite (*i.e.,*

3. In the interest of judicial economy and avoiding a second appeal, we state that based on our review of the record we would not find an award of $100,000 to be excessive, if the remittitur is refused.



the instant suit), "Flex-a-Lite probably wouldn't be around much longer"; (3) that Flex-a-Lite's fans were of an inferior quality;[4] (4) that "Flex-a-Lite was a very small company that operated out of a sort of farmhouse in Washington"; and (5) that Flex-a-Lite's major supplier was for sale.

The trial court categorized these defamatory statements as "slander *per se*," presumably because they were disparaging of Flex-a-Lite's trade or business. *See* Prosser, *Law of Torts* 756-759 (4th ed. 1971). Because ~~Flex-a-Lite~~ Schwitzer (*sic*) fails to argue that the statements were not defamatory, we need not decide whether any or all of them were. The court found it "impossible to accurately say what portion of the damage is attributable to the slander . . ." but on the ground that "the law allows substantial damages to be awarded for malicious slander per se without proof of such damage," awarded $251,088 in "actual" damages to Flex-a-Lite on the defamation count. The court found these damages had been merged, however, with those that it had awarded to Flex-a-Lite for decline in overall profitability under the contract claim. Because we have held that award erroneous, and because the court also awarded punitive damages for defamation, we must consider the propriety of awarding damages for defamation.

In addition, the trial court awarded $250,000 in punitive, or exemplary, damages to Flex-a-Lite. The court's only stated rationale in support of this award was that the damages should be awarded

> to punish Wallace-Murray Corporation for the wrongful conduct of its Schwitzer Division; to deter it from such fraudulent conduct in the future; and to serve as an example to others who might, if Wallace-Murray Corporation were to go unpunished, be tempted to engage in similar conduct.

4. The court also found that Krug had deliberately conveyed to customers the false impression that Flex-a-Lite's fans were inferior to Schwitzer's, which is merely to be equivalent to saying that Schwitzer's were better than Flex-a-Lite's, which could hardly be the basis for an award of damages.

Schwitzer's arguments in support of reversal are two-fold: first, that Schwitzer cannot be held responsible for the defamatory statements of Krug, inasmuch as Krug was not vested with authority to make the statements; and second, that the trial court applied erroneous legal standards in determining Schwitzer's liability in the light of the Supreme Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). We reject the first argument, but accept the second and accordingly reverse the award of damages for defamation.

A.

Schwitzer's Vicarious Liability

Schwitzer argues that it explicitly told Krug not to say anything defamatory about Flex-a-Lite, and that these instructions absolved it from liability for Krug's statements made contrary to the directive. The pertinent Indiana cases indicate that an employee's defamatory statements made in the course of carrying out his duties to his employer are imputed to the employer. *Big Wheel Restaurants, Inc.* v. *Bronstein*, 158 Ind. App. 422, 302 N. E. 2d 876 (1973); *Writesman* v. *Pettis Dry Goods Co.*, 82 Ind. App. 504, 510, 146 N. E. 835, 837 (1925). While neither case involved defamatory statements made in violation of explicit directions from the employer,[5] a principal ordinarily cannot absolve itself from liability for its agent's tort committed in carrying out the principal's business by a directive not to commit torts. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Sullivan*, 141 Ind. 83, 88, 40 N. E. 138 (1895). *See also*

5. In *Big Wheel Restaurants* the defendant argued that its employee "had no authority to make statements which would bind Big Wheel." 158 Ind. App. at 427, 302 N. E. 2d at 878. The court noted that the employee had testified that "he never told her [the person to whom he had uttered the defamatory statements] the company had told him not to comment and not to talk to reporters." *Id.* at 879. Similarly, there is no evidence in the record that Krug conveyed to his listeners that he was speaking solely on his own behalf, and contrary to the wishes of his employer.



*Restatement (Second of Agency)* ¶ 247 (1957). Thus, Schwitzer and its parent, Wallace-Murray Corporation, are vicariously liable for defamatory statements made by Krug.

B.

Substantive Defamation Law

As we have said, the trial court awarded compensatory damages on Flex-a-Lite's defamation count only upon a finding that the statements themselves had been uttered, from which the trial court presumed damages. Punitive damages were also awarded. Under *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), however, neither presumed nor punitive damages may be awarded a private defamation plaintiff unless the defamatory falsehoods were uttered with "constitutional malice," *i.e.*, with actual knowledge that the statements were false, or with reckless disregard of whether they were true or false.[6] The constitutional malice must be established by clear and convincing evidence. *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Although the states are free to impose liability for defamatory falsehoods not meeting the test, only compensatory damages are then recoverable. Indiana seems not to have decided what liability test is applicable for private defamation statements such as those in the case at bar.[7]

In the instant case the trial court did not find actual injury and indeed it was impossible to do so. We agree that Flex-a-Lite has not shown actual injury that would support an award of

6. "Reckless disregard" had earlier been defined by the Court as "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968).

7. We have found no post-*Gertz* Indiana case. In *Aafco Heating & Air Conditioning Co.* v. *Northwest Pub Inc.*, 321 N. E. 2d 580 (Ind. App. 1974), and *Patten* v. *Smith*, 360 N. E. 2d 233 (Ind. App. 1977), the Indiana Court of Appeals adopted a malice standard for claims of defamation with respect to matters of public concern.

compensatory damages.[8] The trial court was right in not awarding such damages.

The awards of presumed damages and punitive damages which the court did make cannot stand, because the court did not make adequate findings of constitutional malice,[9] and in any event Flex-a-Lite pointed to no evidence, and we have found none that would support such a finding if it had been made.

The *Gertz* case had been in the books for over two years when the case at bar was decided in the District Court. Counsel for plaintiff is chargeable with knowledge of the requirements of that case; yet he failed to present the issue of constitutional malice to the trial judge, and the judge did not address that issue.

8. The witnesses who testified that they had heard, or heard of, Krug's statements also testified that they either did not believe the statements or determined that they were false; thus this testimony was to the effect that the statements did not harm Flex-a-Lite.

9. The statement in the findings that Krug knowingly caused the circulation of false and misleading statements concerning the financial condition of Flex-a-Lite" will not suffice. To begin with, "knowingly" does not necessarily modify any word except cause. In any event, this finding refers only to Krug's statements regarding the "financial condition of Flex-a-Lite." Yet the trial court's award of defamation damages was predicated on more than those statements. The conclusory statement that "Schwitzer falsely and maliciously slandered the stability of Flex-a-Lite with the intent to injure Flex-a-Lite, and to obtain for itself sales which would otherwise have gone to Flex-a-Lite" does not meet the *New York Times* test, for it does not exclude the possibility that Schwitzer believed its statements to be true, or did not entertain serious doubts as to their truth, see n. 5, *supra*. "Maliciously" may refer, and indeed appears to have been intended to refer, to the intent to harm Flex-a-Lite by taking business away from it rather than to knowledge of falsity or facts which could lead a reasonable person to entertain doubt as to truth. This interpretation is confirmed by references to mere negligence in the same paragraph with respect to one of the allegedly defamatory statements, *viz.*, that Flex-a-Lite's supplier was for sale. In any event, even if existence of "constitutional malice" had been found, an incorrect standard of evidentiary proof was applied. The findings merely stated that the plaintiff had proved its case—both with respect to the presumed and the punitive damages—by a preponderance of the evidence.



In view of the absence of the requisite constitutional malice finding, the dubious evidentiary support for such a finding if it had been made, and the full opportunity afforded to try the case the first time around, we are not disposed to remand on this issue. The award of damages for defamation is set aside.

For the reasons stated above, the judgment is reversed and the case is remanded to the District Court with directions to enter a new judgment in favor of Flex-a-Lite in the amount of $108,595, if Flex-a-Lite assents to the remittur herein ordered, and otherwise to enter a new judgment in the amount of $8,595 plus such amount as the District Court awards as punitive damages pursuant to the directions contained in Part I, D of this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

NOTE BY PETITIONER: The first nineteen pages of the District Court Decision trace the history of the pleadings, and the meeting of jurisdictional requirements. The findings of fact from the evidence commence on page A30.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

No. IP 73-C-312

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SCHWITZER DIVISION, WALLACE-MURRAY CORPORATION,
*Plaintiff-Counterdefendant,*
*vs.*
FLEX-A-LITE CORPORATION,
*Defendant-Counterclaimant.*

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## TRIAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ENTRY

This action was commenced with the filing by plaintiff of a three count complaint against the defendant on May 31, 1973 in the Superior Court of Marion County, Indiana. Count one of the complaint is a claim for the price under an August 31, 1972 contract entered into in Indianapolis, Indiana, whereby defendant agreed to purchase from the plaintiff at an agreed unit price during 1973, between four hundred thousand (400,000) and five hundred thousand (500,000) automobile fans to be manufactured by the plaintiff; under such contract, as modified, the plaintiff manufactured and delivered to defendant automotive fan units at a price of three hundred thirty-four thousand two



hundred eleven and sixteen hundredths dollars ($334,211.16) which it alleges is due and unpaid as defendant completely repudiated (repudiation made specific on October 17, 1974) such contract, as modified, although plaintiff duly performed all conditions of such contract and has been ready, willing and able to perform; and plaintiff prays for judgment for such price, as well as certain incidental and consequential damages in an amount not then determined, interest, costs, and all other proper relief. Count two of the complaint asserts a claim for repudiation (repudiation made specific on October 17, 1974) of such contract in that plaintiff manufactured such fans in accordance with such contract and offered to deliver the fans to plaintiff and has ever since been ready, willing and able to deliver such fans, and has otherwise duly performed all conditions of such contract and the plaintiff prays for judgment for the same damages referred to in count one. Count three of the complaint asserts a claim on an account for such fans manufactured and sold by plaintiff to defendant at defendant's instance and request and plaintiff prays for judgment for three hundred thirty-four thousand two hundred eleven and sixteen hundredths dollars ($334,211.16), interest, costs and all other proper relief.

On June 20, 1973, the defendant filed a petition to remove the action to this Court and such removal was duly effected.

On October 31, 1973, defendant filed its answer to the three counts of the complaint which consisted of one defense, admissions and denials, in each defense to each count of complaint, and prays for judgment that plaintiff take nothng by counts one, two and three, except for fans actually received and accepted by defendant after allowing for amounts already paid by defendant.

On October 31, 1973, a counterclaim in two counts was filed by defendant (counterclaimant). Count one of the counterclaim asserts that the counterclaimant entered into such written contract in good faith with such goal of marketing four hundred thousand (400,000) to five hundred sixty thousand (560,000) fans to be manufactured by counterdefendant; that such goal

would have been readily achieved but for the alleged acts and omissions of the counterdefendant of (a) failure to timely produce the fans to supply them to counterclaimant's customers, in time for testing their fitness for sale in the automotive aftermarket, in time for sales samples in order that counterclaimant's salesmen and sales representative could show the fans in time for purchasers to book their 1973 requirements, (b) by reason of the omissions recited in (a) prevented the counterclaimant from preparing and producing sales catalogs and other sales literature in time for presentation to customers making their commitments for 1973 purchases, and prevented the counterclaimant from displaying the fans at automotive parts shows in late 1972 where purchasers determine which fans they would purchase for distribution in 1973, (c) when counterdefendant did get into production, the fans were cosmetically unattractive for aftermarket sale (as opposed to original equipment sale for assembly by the manufacturer of automobiles) because of defective paint work, scratches and blemishes, (d) when the fans were finally furnished for testing they were found to be defective in that the paint was defective, scratched and blemished, they were out of balance, they were marginal in airflow, their airflow decreased at high revolutions, they lost projective width in testing, they became permanently defaced or disintegrated or fluttered in testing, and some fans had blades which hooked on a rivit of the trailing edge of an adjacent blade, (e) counterclaimant pointed out the defects in such fans the counterdefendant denied the existence of such defects and did not correct such defects, (f) counterdefendant failed to follow procedures agreed upon and even failed to follow its own announced procedures in the handling and shipment of such fans and billing for such fans, (g) counterclaimant caused confusion and dissatisfaction in filling orders to be shipped directly to counterclaimant's customers by shipping quantities contrary to amounts specified in submitted orders, and (h) counterdefendant wrongfully repudiated such contract, and on May 31, 1973 commenced this action, while efforts were



being made by counterclaimant to meet with responsible executives of counterdefendant to correct all factors existing at that time which were making it impossible to effect high volume sale of such fans; and counterclaimant prays for judgment for one million one hundred thousand dollars ($1,100,000.00) with costs and all other proper relief for counterdefendant's failure to perform such contract in good faith and because of such acts and omissions. Count two of the counterclaim asserts that before such contract the counterdefendant was engaged in producing fans chiefly for original equipment manufacturers while the counterclaimant was engaged in supplying fans of its own design chiefly for the automotive aftermarket and to non automobile manufacturers; that since such contract the counterdefendant has used contract relationship to become better acquainted with aftermarket personalities, procedures, and counterclaimant's customers in both the aftermarket and non automotive field, that since the alleged wrongful repudiation referred to in count one and the institution of this action the counterdefendant has sought to take over counterclaimant's customers and as a part of such planned objective the counterclaimant engaged in the defamation of counterclaimant, its supplier, and its product by the circulation of false and misleading statements concerning counterclaimant's financial condition for the purpose of convincing its customers that they could ill afford to place their business with it because it was in failing financial condition and would be going out of business and would, therefore, be unable to fill the customers' requirements; that such false statements included those that counterclaimant is broke and cannot pay its bills, that its sales manager was quitting and going to Chicago to look for work, that its supplier of fans would cease to supply it, and such false statements were peddled widespread to counterclaimant's customers and coupled with other true, and half true statements to the effect that counterclaimant does not manufacture fans and operates out of an old two-story house with a barn behind it to create a total picture of a fly-by-

night corporation which could not hope to continue in business because of financial insolvency, demoralized employees and a makeshift operation; that the counterdefendant has defamed the products of the counterclaimant by claiming them to be of inferior quality and in purported proof thereof, exhibiting to customers alleged comparative performance curves, and then falsely interpreting the meaning of such alleged performance curves to customers; whereas the true facts were that the counterclaimant designed and patented its fans, that it was in a national and international operation, that it was sound and healthy financially, and that it could deliver quality products at competitive prices on all orders obtained; and the counterclaimant prays for judgment for compensatory damages and punitive damages in the sum of five million dollars ($5,000,000.00) and for all other proper relief in the premises such as an injunction prohibiting the continuation of such slanderous conduct, and costs of this action because of the willful and deliberate intent of counterdefendant to injure the counterclaimant by such false and malicious statements which were examples only.

On February 5, 1974, the counterdefendant filed its reply to the counterclaim which consisted of two defenses to count one of the counterclaim, the first of which consisted of admissions and denials and the second of which consisted of an alleged waiver and/or estoppel of counterclaimants from relying upon such defects in the fans in order to justify rejection or to establish breach of such contract by counterdefendant as counterclaimant failed to provide a full and final written statement of all defects as requested by counterdefendant after the alleged rejection of the fans by counterclaimant; and that counterclaimant was precluded by way of waiver and/or estoppel from asserting a claim against counterdefendant based upon alleged defects in the fans, as counterclaimant has failed and refused to avail itself of the remedy provided by rhetorical paragraph twelve of such contract to return such allegedly defective fans to the counterdefendant for full credit; and that counterclaimant's alleged rejection of the fans was ineffective as it was not made in good faith, and was not given within a reasonable time after delivery or tender of such fans, and counterclaimant did not seasonally notify counterdefendant thereof.



In a pre-trial conference on August 21, 1974, the plaintiff declared the theory of its three counts of complaint as seeking various remedies under the Uniform Commercial Code and the counterclaimant declared the theory of its two counts of counterclaim by stating count one alleged a breach of the contract sued upon in the complaint and count two alleges compensatory and punitive damages for alleged business slanders and unfair competition arising after termination of the contract sued upon in the complaint. In such pre-trial conference, the plaintiff was ordered to make specific the plaintiff's contentions in respect to defendant's alleged contractual repudiation. By plaintiff's letter dated October 17, 1974, the plaintiff complied with such order by reciting that the following specific matters and others were the basis for this litigation and termination of the contract "for cause" which is defined in article thirteen of the contract, (a) defendant failed and refused to pay for the fans ordered by it including those which were manufactured at defendant's request and held at defendant's warehouse facilities at Rolla, Missouri; (b) defendant failed to expend best efforts to market the subject fans; (c) defendant failed to specify alleged defects in subject fans, despite continued requests by plaintiff to do so and despite continued requests for defendant to return the allegedly defective fans, pursuant to article twelve of the contract; (d) defendant failed and refused to comply with article four of the contract in that it did not provide plaintiff with purchase orders and releases as required, either in terms of firm commitments or timeliness; and further complied with such pre-trial order by providing an enclosure with such October 17, 1974 letter disclosing the breakdown of plaintiff's alleged damage in each of the three counts of the complaint, subject to adjustment on account of the proceeds from resale of the fans by plaintiff, the balance as recapitulated

exceeds the claims in each of the three counts of the complaint of three hundred thirty-four thousand two hundred eleven and sixteen hundredths dollars ($334,211.16), which recapitulation is as follows, total billing to defendant per releases two hundred ninety-seven five hundred seventy and forty hundredths dollars ($297,570.40), advertising materials eighty-seven and ten hundredths dollars ($87.10), rework cost sixteen thousand nine hundred eighty-three and fifty-two hundredths dollars ($16,983.52), sorting cost nine hundred ninety and forty-five hundredths dollars ($990.45), repackaging cost four thousand one hundred two and seventy-five hundredths dollars ($4,102.75), cost of retaining inventory forty-six thousand eight hundred sixty-five and forty-five hundredths dollars ($46,865.45) for a total of three hundred sixty-six thousand five hundred ninety-nine and sixty-seven hundredths dollars ($366,599.67) less the amount paid of eleven thousand two hundred two and sixty-five hundredths dollars ($11,202.65) for a balance of three hundred fifty-five thousand three hundred ninety-seven and two hundredths dollars ($355,397.02).

On October 18, 1974, the counterdefendant with approval of the Court filed two additional unnumbered defenses in reply to count two of the counterclaim which will be referred to herein as the third and fourth defenses. The third defense alleges that the alleged defamatory and/or disparaging statements allegedly made by counterdefendant were true. The fourth defense alleges that the alleged defamatory and/or disparaging statements allegedly made by counterdefendant were privileged in that, (a) they were made in defense of certain derogatory, defamatory, and disparaging statements made by counterclaimant's personnel regarding counterdefendant and its products, or were made as part of and as a result of an existing controversy between the parties to this action; (b) they were made by counterdefendant in criticism of counterclaimant's product or enterprise; (c) they were made by counterdefendant upon request of third persons who had a right to know such information; (d) they



were made by counterdefendant in a competitive context and were reasonably believed to be true by the publisher and made without malice; and (e) they were made by counterdefendant as merely statements of opinion, reasonably believed to be true, and related primarily to counterdefendant's products in comparison with those of the counterclaimant.

The case was called for trial on June 26, 1975. The plaintiff's counsel in his opening statement declared that the theory of the three counts of complaint each sound in contract with count one, being an action for the contract price under the Uniform Commercial Code, count two, being an action for anticipatory repudiation breach of the contract under the Uniform Commercial Code, and count three, being a common count statement of account under the Uniform Commercial Code. The defendant's counsel in his opening statement declared that the theory of count one of the counterclaim sounded in contract, being an action for anticipatory repudiation breach of the contract under the Uniform Commercial Code and that there are two theories of action, each sounding in tort, stated in count two (being renumbered counts two and three), count two alleges an unintentional tort (negligence) of alleged business slanders and unfair competition arising after termination of the contract sued upon in count one of the counterclaim, and count three alleges a willful tort of alleged business slanders and unfair competition arising after termination of the contract sued upon in count one of the counterclaim. Counsel for the parties on June 26, 1975, advised the Court that the contract issues of the case are governed by the laws of the State of Indiana.

During the trial on July 7, 1975, counsel for the parties advised the Court that the law of the State of Indiana governs the defamation issues of counts two and three of the renumbered counts of the counterclaim.

After eighteen days of a bench trial (June 26, July 7-10, July 14-18, July 21-23, July 28, 29, September 29, 30, and October 2, 1975) the counterclaimant on October 2, 1975 filed

a written Motion for Leave of Court to File Supplemental Pleading and orally moved to amend the counterclaim by adding a count to the counterclaim. Following a discussion of the matter on the record, the counterclaimant was given until October 9, 1975 to decide whether it wished to file a supplemental or an amended pleading to conform to the evidence. On October 9, 1975, counterclaimant filed its Rule 15(b), Federal Rules of Civil Procedure, Motion, together with a supporting memorandum, for Leave of Court to Amend Counterclaim by Adding a Third Count (sic) (Fourth Count) Thereto Conforming to the Evidence and Praying for Exemplary Damages.

In accordance with the October 2, 1975 order the counterdefendant on October 16, 1975 filed a brief in opposition and counterclaimant on October 24, 1975 filed a reply brief in support of the motion.

The tendered fourth count of counterclaim alleges one group of facts which present a claim for willful tortious breach by counterdefendant of the contract sued upon in count one of the counterclaim and it alleges another group of facts which present a claim for an abuse of process in the claims filed in its complaint filed May 31, 1973 in this action amounting to the willful or malicious use of process in presenting fraudulent claims of breach of the August 31, 1972 contract against Flex-A-Lite Corporation and fraudulent claims of damage from breach of contract against Flex-A-Lite Corporation which the process was not intended by the law to effect. It alleges that counterclaimant entered into the August 31, 1972 contract in question in good faith with the goal of marketing for the year 1973 from four hundred thousand (400,000) to five hundred sixty thousand (560,000) fans to be manufactured by counterdefendant; it alleges the subject fans, principally flex fans, were understood by both parties to be required to be of original equipment quality, but counterdefendant did not at any time furnish flex fans of such quality, but to the contrary planned on delivering and did deliver flex fans of lesser quality; it alleged that such contract



provided that specifications for flex fans acceptable to counterclaimant should be developed by counterdefendant but such fan was never developed nor were any such specifications submitted although such was requested by counterclaimant; it alleges that such contract further provided that any fans manufactured which failed to conform to the specifications as to design, quality of workmanship, or that were defective in any manner could be returned for full credit; it alleges that counterdefendant never having drawn any specifications for the flex fans contracted for by the parties, nevertheless counterdefendant denied that any fault existed in its flex fans and refused counterclaimant permission to return such fans fully knowing such flex fans were not of original equipment quality; it alleges that when counterclaimant did return such fans, counterdefendant wholly failed to give full credit as promised; it alleges that the contract provided:

> "Both Parties agree to the timely development of promotions, adminstration, marketing and production requirements to accommodate marketing of between 400,000 and 560,000 units during calendar year 1973;"

it is alleged that despite such provision of the contract of August 31, 1972, the counterdefendant knew that production of such fans probably could not be attained before January of 1973 which led counterclaimant to believe that fans could be promised for delivery in the fall of 1972, the counterdefendant failed to deliver sufficient samples for showing prospective customers of counterclaimant until November of 1972, but in August promised immediate delivery to Frigiking, a customer, the counterdefendant failed to timely furnish samples in sufficient quantities for showing prospective customers of counterclaimant in time for purchasers to book their 1973 requirements and include such fans in their catalogs, the counterdefendant knew and intentionally failed to furnish test samples to counterclaimant and failed to test production models of its own fans before selling them to counterclaimant for resale to the aftermarket, the counterdefendant, on April 3, 1973, falsely assured counter-

claimant that the fans were of original equipment quality and had been tested accordingly when in fact the fans were not of such quality and production models had not been tested, the counterdefendant billed the counterclaimant for fans for which it had already received payment, the counterdefendant shipped counterclaimant's customers incorrect numbers of fans, counterdefendant shipped fans ordered by one customer to a different customer who thereupon received more fans than it had ordered and the other customer received none, the counterdefendant shipped fans cosmetically unattractive and without eye appeal because of poor paint and poor application of paint, stacked in boxes without any protective separation between fans, with the result that such fans, already unattractice, arrived at their destination scratched, scraped and with paint ground off by metal working against metal, the counterdefendant set up shipping and invoice procedures unilaterally and then did not follow such procedures, counterdefendant double-billed counterclaimant for thousands of dollars and instead of correcting such billings when counterclaimant complained did continue to so double-bill, counterdefendant charged to counterclaimant thousands more fans of particular part numbers than counterclaimant had authorized to be built and continued to produce such fans after being told by counterclaimant to stop, counterdefendant stored finished fans in its warehouse at Rolla, Missouri, on February 20, 1973, instead of completing unfilled shipments ordered in December of 1972 contrary to instructions of counterclaimant, counterdefendant, without advising counterclaimant, directed its attorneys to prepare a legal action against counterclaimant while the August 31, 1972 contract was in effect and each were professing good faith in attempting to make the relationship succeed, and the counterdefendant knowing that its fans were defective in that they were unable to complete reasonable durability tests for acceptability as required by original equipment manufacturers and knowing all of these alleged facts of the proposed amended counterclaim did on May 31, 1973



institute the instant action without warning against counterclaimant for more fans than it had delivered to counterclaimant and without ever having submitted a correct billing; it alleges that in such complaint filed in this action on May 31, 1973, while such contract was in full force and effect, the counterdefendant with fraudulent intent sought to recover from counterclaimant many thousands of dollars expended by it for tooling in preparation for the production of the series of fans, some of which counterclaimant later agreed to buy for resale to aftermarket customers, when in truth counterdefendant had contracted for the purchase of such tooling long before the agreement of August 31, 1972 was executed and when in truth the counterdefendant was actively engaged in the sale of such fan series to the aftermarket before the August 31, 1972 contract was executed; it alleges that counterdefendant in the complaint filed May 31, 1973, while such August 31, 1972 contract was in force, did with fraudulent intent, deceitfully sought to recover the difference between the cost of certain stainless steel which it claimed it had purchased to perform such contract, and the amount it allegedly received from the sale of such steel as salvage when it allegedly found it no longer had any use for such stainless steel, which difference amounted to many thousands of dollars, when in truth the stainless steel purchased and the stainless steel sold were not the same steel, and were steels of different quality, when in truth more pounds of steel of certain dimensions were sold than were purchased, when in truth counterdefendant has continued to manufacture and sell fans identical to those sold counterclaimant and is still manufacturing and selling them, in the aftermarket, using identical steel with identical dimensions, and when in truth counterdefendant was on May 31, 1973 engaged in the manufacture of steel, specialty steel, and steel products and its attempt to "foist off" the steel sold as that purchased for the August 31, 1972 contract and was knowingly done with fraudulent intent; it alleges that the attempt to oppressively assess the tooling costs and the pre-

tended loss on the purchase sale of steel against counterclaimant was disguised and concealed by the use of misleading general language in rhetorical paragraph nine of count one of the May 31, 1973 complaint in this action:

> "9. As a result of Flex-a-lite's repudiation and breach of said contract, Schwitzer has been damaged in the sum of $334,211.16, *as well as certain incidental and consequential damages in an amount not yet determined;*"

and in paragraph three of count two of the May 31, 1973 complaint in this action:

> "3. Flex-a-lite has not accepted or paid for the fans, and Schwitzer has been damaged thereby in the sum of $334,-211.16, *as well as certain incidental and consequential damages in an amount not yet determined;*"

it alleges that the August 31, 1972 contract provided that a party could terminate such contract for "cause" (which must amount to breach of contract) *only* after giving the other party thirty (30) days wirtten notice; it alleges counterclaimant has been damaged by the counterdefendant's alleged breaches of such contract; it is alleged that because of the willful and oppressive alleged breaches of contract, and the fraudulent intent accompanying certain of them, the assessment of exemplary damages is required for the protection of the public and punishment of the wrongdoer, in an amount which will be sufficient to deter counterdefendant from repeating its course of conduct, and sufficient to deter other like-minded individuals or corporations from following such a course of conduct; and counterclaimant prays for the assessment of exemplary damages and for all other proper relief in the premises.

The October 9, 1975 Motion for Leave of Court to Amend the Counterclaim by Adding a Fourth Count to Conform to the Evidence and Praying for Exemplary Damages was granted and the tendered fourth count of counterclaim was filed on January 12, 1976. On February 2, 1976 the counterdefendant



filed its reply to fourth count of the amended counterclaim which consisted of eight defenses, the first of which was admissions and denials of certain of the allegations of the fourth count of the amended counterclaim; the second of which asserts counterclaimant was precluded by way of waiver and/or estoppel from relying upon the fans' alleged defects to justify rejection or to establish breach by counterdefendant of the August 31, 1972 contract as counterclaimant has failed to provide to counterdefendant a full and final written statement of all such defects; the third of which asserts counterclaimant was precluded by way of waiver and/or estoppel from asserting a claim against counterdefendant based upon alleged defects in the fans, as counterclaimant has failed and refused to avail itself of the remedy provided by paragraph twelve of the contract of August 31, 1972, to return such allegedly defective fans to the counterdefendant for full credit; the fourth of which asserts that counterclaimant's rejection of the fans is ineffective as it was not made in good faith and was not given to counterdefendant within a reasonable time after delivery or tender of the fans and/or as counterclaimant did not seasonally notify counterdefendant thereof; the fifth of which asserts that the action, insofar as it seeks recovery for counterdefendant's alleged acts in filing this action and the alleged acts of fraud in the presentation of its claim and damages therefor, is precipitous and cannot be raised in the same litigation allegedly giving rise to the acts complained of; the sixth of which asserts that the action insofar as it seeks recovery for counterdefendant's alleged acts in filing the lawsuit, and the alleged acts of fraud in the presentation of its claim and damages therefore were absolutely privileged by virtue of the fact that the alleged acts all occurred in connection with and as a part of a judicial proceeding; the seventh of which asserts that counterdefendant is precluded from recovery herein because of its own fraudulent conduct in wilfully, knowingly, maliciously, and in bad faith deceiving counterdefendant as to its ability and intention to perform the contract as promised, in that while fully

aware of its own inability to perform as represented it embarked upon a fraudulent course of conduct to avoid its contractual obligations by a continued pattern of consciously false excuses for nonperformance, and wilful refusal to respond to counter-defendant's lawful demands under the contract of August 31, 1972 for specifics in respect to the falsely alleged design defects of fans and for payment for the fans; and the eighth of which asserts that to the extent that the fourth count of the amended counerclaim alleges a breach of contract, and no independent tort for gross fraud, the alleged breach on counterdefendant's part was privileged and counterclaimant is limited to its actual damages allegedly arising therefrom. The counterclaimant filed its rejoinder on February 11, 1976 to each of the second through the eighth affirmative defenses of the reply to the fourth count of the amended counterclaim which consisted of denials of the allegations of each of the defenses two through eight of the counterdefendant's reply.

The counterclaimant and counterdefendant on May 24 and 25, 1976, respectively, declined the Court's offer to reopen the trial for additional evidence.

The Court has been advised in the matter since trial by the parties' tendered findings of facts and conclusions of law and post trial briefs which briefs consisted of two hundred fifty-three pages, the last of which was filed April 15, 1976. The Court has reviewed the evidence, determined the credibility of the witnesses and evidence and does now submit its rulings.

On May 31, 1973 and at all times in question the plaintiff and counterdefendant, Wallace-Murray Corporation, was duly organized and existing under the laws of the State of New York with its operating division entitled "Schwitzer Division, Wallace Murray Corporation" and had its principal place of business in Indianapolis, Indiana, which said division was engaged in the manufacture and sale of automotive fans and other engine components. On May 31, 1973 and at all times in question the



defendant and counterclaimant, Flex-A-Lite Corporation, was duly organized and existing under the laws of the State of Washington and had its headquarters in Tacoma, Washington, which corporation was engaged in the business of selling and distributing throughout the United States of America automotive fans. That the matters in dispute on May 31, 1973 and at all time in question exceed the sum of ten thousand dollars ($10,000.00), exclusive of interest and costs.

On August 31, 1972, the two corporations who are now parties to this lawsuit entered into a contract for the marketing of steel automotive cooling fans, hereafter referred to as "the contract", a copy of which is marked Exhibit A, is attached hereto and made a part hereof. Prior to execution of the contract, plaintiff and counterdefendant, Wallace-Murray Corporation through its Schwitzer Division, hereafter referred to as "Schwitzer", was engaged in manufacturing, in addition to other items, automotive cooling fans for automotive original equipment manufacturers, and was either the largest or one of the largest manufacturers of such fans. Prior to execution of the contract defendant and counterclaimant, Flex-A-Lite Corporation, hereafter referred to as "Flex-A-Lite", was primarily engaged in the marketing of fiberglass automotive and industrial cooling fans of its own design to the "aftermarket", that is, to wholesale automotive parts distributors, automotive air conditioner manufacturers, discount stores, and other customers other than original equipment manufacturers. Flex-A-Lite was a small corporation, relative to Schwitzer, but was one of the largest marketers of automotive fans in the aftermarket and was financially sound. Flex-A-Lite enjoyed the reputation of marketing quality products and rendering prompt efficient service. Prior to execution of the contract, at least as early as February 1971, Schwitzer desired to enter the aftermarket with a line of flexible blade steel fans of its own design and manufacture. Prior to the contract, Flex-A-Lite marketed flexible blade fiberglass fans and semi-flexible blade steel fans, but did not market a fully flexible

blade steel fan. Under the contract, Flex-A-Lite was designated as Schwitzer's primary agent for marketing Schwitzer's product line of "automotive steel flexible blade fans", hereafter called "steel flex fans", to all purchasers within the United States, except original equipment manufacturers such as Ford, Chrysler, etc., denominated OEM, and except aftermarket customers, Murray Corporation of Cockeysville, Maryland, and Eagle Parts Corporation of Fort Worth, Texas were excluded from the contract, and sales to them were to be continued by Schwitzer. (The contract also provided for marketing of Schwitzer's standard stiff-bladed fans, called "spider" fans, but they are not in issue here.) The contract set a marke ing goal for calendar year 1973 of 400,000 to 560,000 fans (including spider fans) and obligated both parties to the timely development of production, marketing and administrative procedures to facilitate meeting the goal. The contract did not constitute an agreement by Schwitzer to manufacture, or Flex-A-Lite to purchase any definite number of fans in calendar year 1973. Flex-A-Lite entered into the contract in good faith, with a reasonable expectation of marketing from 400,000 to 560,000 steel fans for calendar year 1973. The 1973 marketing goal of 400,000 to 560,000 fans was a reasonable objective based upon the best information available to the parties at the time the contract was executed.

At the time the contract was executed Flex-A-Lite reasonably believed production quantities of Schwitzer's steel flex fans would be available in early fall 1972. In precontract negotiations Schwitzer represented that the steel flex fans had been developed and that production quantities could be expected "in August or sooner, if we reach agreement". By letter of September 5, 1972, which enclosed the executed contract, Schwitzer specifically advised Flex-A-Lite to expect limited production of the steel flex fans in early October 1972, and full production by the end of 1972, thus assuring ample supplies of fans for delivery to Flex-A-Lite's customers by the start of calendar year 1973. Schwitzer's



representations were false in that Schwitzer at the time it advised Flex-A-Lite that production would be underway in October, 1972, knew that some of the essential tooling required for production of its steel flex fans would not be received by it before December, 1972, and that production quantities could not reasonably be expected before January, 1973. Flex-A-Lite, relying upon such false representations, signed the contract and commenced its efforts to market the fans. Under the contract Schwitzer was obligated to advise Flex-A-Lite of any unusual delays as they became known. Schwitzer never took any affirmative action to advise Flex-A-Lite of production delays. Rather, Schwitzer admitted production delays only as forced to do so by the passage of time without production having been achieved. On December 20, 1972, Schwitzer advised Flex-A-Lite that all fans Flex-A-Lite had scheduled for January shipment would be shipped on January 15, 1973. On January 15, 1973, at a meeting with Flex-A-Lite, Schwitzer falsely represented to Flex-A-Lite that fans were being shipped that day to fill all outstanding shipping orders. At that time Flex-A-Lite had 10,000 flex fans on shipping order. Because of urgency Flex-A-Lite had directed prior to January 15, and Schwitzer had agreed, to ship more than 3,600 of these flex fans directly to specific customers. Of these 10,000 flex fans on order Schwitzer in fact shipped only 1,060 on January 15, 1973. Schwitzer never told Flex-A-Lite that it had not shipped the 10,000 fans on January 15, 1973, or that it had not made the direct shipments to Flex-A-Lite's customers. Flex-A-Lite relied upon Schwitzer's false representation. The Court draws the inference that Flex-A-Lite was harmed by its reliance on Schwitzer's false representation since Schwitzer made no further shipment of flex fans until February 5, 1973, and did not make shipments to fill all orders which were on hand January 15, 1973, until mid-March, 1973. Schwitzer first produced steel flex fans in what could reasonably be termed "production quantities" after February 1, 1973. Significant quantities of all models were not shipped to Flex-A-Lite's warehouses until after mid-March, 1973.

At the time the contract was executed and the marketing goal was set, Flex-A-Lite was led to believe by Schwitzer that it would furnish sales samples of each model of the steel flex fans from initial production no later than early October, 1972. About 100 samples of each model were needed by that time in order for Flex-A-Lite salesmen and sales representatives to show them to prospective purchasers who would be determining their 1973 requirements, and deciding which fans to place in their 1973 catalogs. Schwitzer shipped 25 "hand made" units of each of two steel flex fan models to Flex-A-Lite on November 6, 1972, and 75 each of the same two models on November 8, 1972. By reason of the unavailability of sales samples prior to mid-November, 1972, Flex-A-Lite was unable to display the steel flex fans at some automotive parts shows in the fall of 1972 where prospective purchasers were considering their 1973 requirements. Unavailability of fan samples contributed to delay in preparation of Flex-A-Lite's 1973 sales catalog, further hampering timely sales presentations by Flex-A-Lite. Schwitzer was aware of the damage to Flex-A-Lite's marketing efforts resulting from unavailability of sales samples. Flex-A-Lite brought this to Schwitzer's attention by letter of November 10, 1972, specifically mentioning the damage to promotions being caused by lack of sales kits for Flex-A-Lite's zoning marketing managers and 70 manufacturers' agents, and noting that sales kits could not be "put into their hands until late November or early December, assuming of course, that all sales samples will be arriving at an early date." By letter of January 6, 1973, Flex-A-Lite again explained the damage done by lack of sales samples. While failing to provide Flex-A-Lite with adequate sales samples, Schwitzer offered immediate delivery of samples to another customer, Frigiking, in August, 1972. When confronted with this discriminatory treatment of Flex-A-Lite, Schwitzer explained that the samples had to be hand made, and that it would have been too expensive to supply Flex-A-Lite with its needs. There was, however, no indication that Flex-



A-Lite expected free sales samples. The contract provided that Flex-A-Lite would pay all marketing and advertising costs.

Under the contract, the design and specifications of the steel flex fans were initially the responsibility of Schwitzer but were required to be acceptable to Flex-A-Lite. At the time the contract was executed both parties understood that the steel flex fans would be required to meet quality standards and pass performance tests at least as rigorous as those required by original equipment manufacturers. Indeed, Schwitzer on September 5, 1972, made representations to Flex-A-Lite which could only be interpreted to mean that the steel flex fans had already been found to meet or exceed such standards. At no time did Schwitzer submit written performance specifications to Flex-A-Lite for approval, but instead continued to assure Flex-A-Lite that the steel flex fans would meet performance standards as high as those required by any original equipment manufacturer. These false representations were relied upon by Flex-A-Lite, which sold the fans in the aftermarket and then was forced to recall certain models because they did not meet OEM standards.

At the time the contract was executed both parties contemplated that Flex-A-Lite would test the steel flex fans to determine whether their design and specifications were acceptable for sale in the aftermarket. Schwitzer knowingly misrepresented to Flex-A-Lite that production models would be available for testing no later than early October, 1972. Flex-A-Lite actually received no production model fans which could be used for testing until mid-February, 1973, and did not receive all models until after mid-March, 1973. Schwitzer was at all times after execution of the contract aware of Flex-A-Lite's desire to obtain fans suitable for engineering tests. Instead of cooperating in providing such fans for immediate testing Schwitzer deliberately avoided providing engineering test samples by representing that production models would be available in ample time for testing before 1973. In the period between June, 1972, and October, 1972, Flex-A-Lite tested several prototype fans which Schwitzer had pro-

vided. When Flex-A-Lite advised Schwitzer that several of those fans had failed performance tests, Schwitzer represented to Flex-A-Lite that they were only "show and tell" fans which should not have been tested. Schwitzer continued to assure Flex-A-Lite that the production model steel flex fans would pass OEM performance standards. Schwitzer never provided pre-production test samples to Flex-A-Lite and never told Flex-A-Lite the results of minimal tests of prototypes which Schwitzer had conducted.

By necessity resulting from Schwitzer's delay in production of the steel flex fans and lack of test samples, Flex-A-Lite relied upon Schwitzer's representations that the fans would meet OEM standards and ordered the first production fans to be shipped directly from Schwitzer's Rolla, Missouri, plant to three of Flex-A-Lite's customers, John Mitchell Co., Alamo Manufacturing Co. (AMC Auto Air Conditioning), and Fan Clutch, Inc., with the following results:

(a) On January 15, 1973, Schwitzer made its first shipment to Alamo Manufacturing. Of nine part numbers ordered, three were not shipped at all. Of six part numbers shipped, Schwitzer undershipped two part numbers, sending 97 of 180 fans ordered. The order was finally filled by another shipment on February 5, 1973.

(b) On January 15, 1973, Schwitzer also made a shipment to Fan Clutch, Inc. Of ten part numbers ordered, Schwitzer sent none of five part numbers and partially filled others, sending 658 of 2,500 fans ordered. Schwitzer sent 50 fans which were supposed to go to Fan Clutch to John Mitchell Co., but represented to Flex-A-Lite that they had gone to Fan Clutch. Schwitzer attempted to complete the order by a shipment on February 5, 1973, but failed to correct the misdirected shipment. Flex-A-Lite billed Fan Clutch which refused to pay because it had not received the fans. John Mitchell Company refused to pay because it had not ordered the fans. Flex-A-Lite was double billed for these fans and was still so double billed at the time of trial.



(c) On January 15, 1973, Schwitzer also made a shipment to John Mitchell Co. Of nine part numbers ordered, Schwitzer shipped none of five part numbers. Of 1,150 fans ordered, 425 were shipped correctly.

(d) Schwitzer completely ignored administrative procedures which Flex-A-Lite had requested Schwitzer to follow in making the direct shipments to Mitchell, Fan Clutch and Alamo. Schwitzer failed to place shipping order numbers on invoices and bills of lading and failed to identify partial shipments, making it nearly impossible for Flex-A-Lite to ascertain the status of shipments and properly bill their customers.

The shipping and paperwork errors which were present in the first direct shipments were only symptomatic of Schwitzer errors which continued through February, March and April, 1973, including the following:

(a) Schwitzer advised Flex-A-Lite by letter March 1, 1973, that it would follow certain invoicing and shipping procedures which it had unilaterally established, but then frequently failed to do so.

(b) Some orders were undershipped, others were overshipped.

(c) Time and time again superseding invoices were issued, supposedly to correct earlier erroneous invoices. Instead of serving as corrections, the superseding invoices resulted in double billings to Flex-A-Lite inasmuch as no actions were taken to nullify the invoices being superseded.

(d) When Flex-A-Lite complained that these invoicing errors would result in double billings Schwitzer assured Flex-A-Lite that they would not. Yet numerous double

billings were included in statements of account upon which Schwitzer demanded payment, and they were never completely corrected. Even the final statement of account attached to Schwitzer's complaint contains numerous double billings, as Schwitzer now admits.

(e) The contract provided for temporary storage of fans in a warehouse area at Schwitzer's Rolla Plant pending shipping orders from Flex-A-Lite. Schwitzer record-keeping errors made it impossible for Flex-A-Lite to ascertain the exact inventory of fans at Rolla at any time. However, Schwitzer's records now in evidence show that on February 20, 1973, fans were improperly placed in storage at Rolla, while shipping orders for the fans were unfilled, and remained unfilled until March 19, 1973. Some models were stored at Rolla and billed to Flex-A-Lite in amounts far exceeding quantities ordered by Flex-A-Lite.

Most, if not all of the first several thousand steel flex fans manufactured by Schwitzer for Flex-A-Lite were blemished, scratched and so unattractive as to greatly impair their appeal in aftermarket sales, as a result of Schwitzer's defective painting and packaging procedures. Schwitzer acknowledged at trial that such problems existed as late as March, 1973. Schwitzer maintained throughout the trial that no serious cosmetic deficiencies existed in fans manufactured after eary March, 1973. Schwitzer contended that allegedly typical fans introduced into evidence by Flex-A-Lite were not representative. However, Schwitzer's own records produced late in the trial and introduced by Flex-A-Lite show that before offering the steel flex fans to other customers after terminating the contract, Schwitzer repainted many, perhaps most, of them. A Rolla inventory record produced by Schwitzer during trial and introduced by Flex-A-Lite shows over 20,000 fans billed to Flex-A-Lite and stored at Rolla had bad paint. Accordingly, it must be concluded that Flex-A-Lite's contentions of unacceptable paint quality were valid, and that Schwitzer knew they were valid.



Flex-A-Lite received, in crushed packages, fans with bent blades, fans packed in boxes without any separation of the fans to prevent metal from grinding against metal, and fans upon which the paint had a grain with an orange peel effect. Photographs were sent Schwitzer and complaints by telegram were made. Flex-A-Lite retouched or repainted from 250 to 300 fans, which repainting continued from February through the month of May, 1973. At least one customer asked to be permitted to return the fans purchased, because of their unattractive appearance.

About March 22, 1973, within a reasonable time after enough production model steel flex fans were received at Flex-A-Lite's Tacoma, Washington, warehouse to permit testing, Flex-A-Lite undertook performance testing of all models. Flex-A-Lite randomly selected fans of each part number from its Tacoma, Washington, and Jacksonville, Illinois, warehouses. On March 26, 1973, Flex-A-Lite requested three of its customers which had received fans shipped directly from Schwitzer's Rolla Plant to randomly select fans of each part number and forward them for testing. Flex-A-Lite's tests included cyclic durability testing in which Flex-A-Lite considered 16,000 cycles to be acceptable performance. Flex-A-Lite had at all relevant times in the past used the same standard of acceptability. Flex-A-Lite was also aware of Chrysler and Ford Motor Company original equipment specifications for cyclic durability testing. Flex-A-Lite's cyclic durability testing of the steel flex fans proceeded as rapidly as possible with Flex-A-Lite's test equipment. Results as of April 20, 1973, when an interim test report was prepared, showed that several models of the fans had failed in cyclic durability testing, whether judged by Flex-A-Lite's standard, Ford's, or Chrysler's. Flex-A-Lite's cyclic durability test program continued through May and June, 1973, with continuing unacceptable results, whether judged by Flex-A-Lite's standard, Ford's or Chrysler's. Special tests conducted to identify the cause of the cyclic durability failures identified the cause as resonance or "flutter" of the flexible blades at certain speeds within the

operating range of the fans, resulting in fatigue failures of the blades. As a result of its testing Flex-A-Lite issued a recall letter for eight models of Schwitzer built full flex fans for the stated reason that a significant number of failures occurred in testing each of the eight models under certain high speed R.P.M. applications.

On March 29, 1973, Flex-A-Lite wrote to Schwitzer, referring to Schwitzer's initial production delays, poor production quality, shipping errors, billing errors, procedural conflicts, design deficiencies and failure to supply technical data. Flex-A-Lite notified Schwitzer of its intention to pay Schwitzer "as appropriate"; return unsatisfactory merchandise on hand; and accept no further shipments until "design, quality and procedure is corrected". The March 29th letter was a reasonable action on the part of Flex-A-Lite, in view of the history of Schwitzer's performance, the apparent lack of improvement resulting from numerous earlier contacts with Schwitzer, and the action was taken in good faith. On April 6, 1973, Schwitzer replied to Flex-A-Lite's letter of March 29, 1973. The letter denies the existence of any serious contractual problems, except for Flex-A-Lite's failure to send shipping instructions for "the blades accumulating in Rolla". The letter of April 6 was not a reasonable response to Flex-A-Lite's assertion of serious problems and was not written in good faith. The April 6 letter specifically denies design deficiencies in its steel flex fans, stating that they were designed to meet original equipment manufacturer's requirements for air flow and durability, had been endurance tested accordingly, and that their "quality exceeds OEM standards which was the agreed criteria". Schwitzer had no basis for such assertions on April 6, 1973, and in fact had considerable evidence to the contrary. These assertions were false, and Schwitzer knew they were false, as shown by later findings herein. On April 19, 1973, Flex-A-Lite wrote to Schwitzer asking for instructions for returning defective fans. Schwitzer responded by telegram on April 24th, refusing to authorize return



of any fans until defects were confirmed by Schwitzer, and stated that it would send an engineer or quality control inspector to Tacoma, if required. Schwitzer did not send personnel to inspect the steel flex fans at Flex-A-Lite's Tacoma laboratory, although Schwitzer continued to discuss with Flex-A-Lite's president a possible visit to Tacoma by top officials as late as May 31, 1973, the day Schwitzer filed suit. In fact, Schwitzer officials had no intention of visiting Flex-A-Lite in Tacoma, as Schwitzer's general manager testified, because of the fear that Schwitzer personnel might be served a summons there. The only evidence of an intention of either party to sue during this period of time is the admission of Schwitzer personnel that Schwitzer began preparing a lawsuit several weeks before May 31, 1973. During the months of April and May, 1973, Flex-A-Lite and Schwitzer communicated through numerous letters, telegrams, and telephone calls. On May 16, 1973, Flex-A-Lite's president met with Schwitzer's top officials of Wallace-Murray Corporation. The Schwitzer officials consistently maintained there were no serious problems other than Flex-A-Lite's failure to pay for many thousands of fans. Schwitzer indignantly insisted there were no design or quality defects in any of its fans, but never made any effort to inspect the fans tested by Flex-A-Lite. Responsible Schwitzer officials made no good faith effort to resolve mutual problems with Flex-A-Lite.

Although Schwitzer at all times represented its steel flex fans to be of original equipment quality, Schwitzer at no time had reasonable grounds, based on its own knowledge, to make such a representation, as indicated by the following facts proven at trial:

(a) In tests on "hand made" prototypes of the steel flex fans conducted from May through September, 1972, results were as follows: Even though only half as many fans were tested as required by Ford, four of nine models tested would have failed Ford's test. Five of twenty-seven fans (18½%) tested failed to meet the 25,000 cycles required by the Chrysler drawing (Ex. HQ) and nine of twenty-

seven tested fans (33⅓%) failed to meet the 32,000 cycle minimum by which Schwitzer judged the full flex fans produced by "Car Care" and "Auto Trend". When in October, 1972, Flex-A-Lite complained about poor cyclic test performance of a few sample fans which had been provided, Schwitzer assured Flex-A-Lite that those were "show and tell" fans which should not have been tested and were not representative. At the same time, discussions of the complaint inside the Schwitzer engineering department resulted in a handwritten notation that, "if these were OEM—some would not have been released".

(b) Schwitzer did not perform engineering tests on a single production model flex fan before releasing the fans for shipment to Flex-A-Lite and Flex-A-Lite's aftermarket customers.

(c) When on January 15, 1973, Flex-A-Lite's general manager expressed concern about an apparent design flaw that might permit a flex fan blade to hook behind a rivet on an adjacent blade during operation, Schwitzer denied that such a thing could happen in actual operation. Yet, in one of its own cyclic durability tests in August, 1972, a blade had hooked in a manner similar to that described by Flex-A-Lite.

(d) While continuing to profess ignorance of design defects in its steel flex fans in the spring of 1973, Schwitzer was in fact verifying the defects in its own laboratory, as further described below, and knew in detail the nature of the defects.

Schwitzer performed no engineering tests on production model steel flex fans until April 11, 1973, after Flex-A-Lite had in effect ordered production stopped on March 29, 1973. On April 11, 1973, Schwitzer began cyclic durability testing of each production model steel flex fan. Though Schwitzer now claims there was no standard acceptability in its cyclic durability tests,



that claim is contrary to some of the evidence and raises the question as to how its testing could be meaningful.

(a) Schwitzer had previously represented in written critiques of other manufacturer's fans that 32,000 cycles was considered the minimum acceptable performance on its cyclic durability test.

(b) Schwitzer's engineers had indicated in internal notes the cyclic durability performance of its fans were not good enough for "OEM".

(c) Schwitzer was well aware of the Ford flex fan specifications and aware of the fact that it had represented its fans would meet *any* OEM standards. The record shows that the Schwitzer cyclic durability test procedure was less rigorous than the Ford test.

The trend of results of Schwitzer's cyclic durability tests of the production models was clear by May 16, 1973, when Schwitzer officials denied knowledge of any defects in a meeting with Flex-A-Lite's president. Whether judged by Schwitzer's 32,000 cycle standard, Chrysler's 25,000 cycle standard, or Ford's standard, which required 90% of production fans tested to complete 12,000 cycles and 50% to complete 16,000 cycles, the interim results indicated a definite and serious design problem. Of 11 flex fan cyclic tests completed by that date, no fan successfully completed 32,000 cycles, less than 46% completed 16,000 cycles, and less than 73% completed 12,000 cycles. By May 16, 1973, Schwitzer had testd 11 fans of five part numbers. To pass the Ford test at least 30 fans—6 of each number—were required to be cycled. Nevertheless, three of the five part numbers had already failed. The testing of the additional 19 fans could not have improved the score, but could, and probably would have resulted in failure of additional part numbers. By May 31, 1973, the day Schwitzer filed suit, 18 fans of eight part numbers had been cyclic tested. Only one fan had completed 32,000 cycles. Five of the eight part numbers had failed the Ford test, in spite

of the fact that an additional twenty-two fans would have been required to be tested to meet Ford specifications. Had the additional twenty-two fans been tested, more part number failures probably would have resulted. The complete Schwitzer production model test results, summarized in August, 1973, showed that of 33 fans cyclic tested (3 each of 9 models and 6 of the 10th) only 1 fan successfully completed 32,000 cycles, and 8 fans failed in less than 12,000 cycles. Although 60 fans would have been required to be tested to meet the Ford specifications, 7 part numbers out of 10 tested had failed. Their failure could not have been erased by the testing of the required 27 additional fans, but as observed before, additional failures would probably have resulted. Twenty-five of the thirty-three fans tested would have failed the 25,000 cycle requirement of the Chrysler full flex fan drawing introduced in evidence. During the same period of time in which Schwitzer belatedly began testing its own steel flex fans it also tested steel fans which it described as "competition" fans, including Flex-A-Lite's semi-flex steel fan (while still supposedly a partner rather than a competitor of Flex-A-Lite). Though not controlling, the results of these tests, performed in the same manner as the tests of Schwitzer fans, lend further weight to the evidence that Schwitzer's own fans were defective.

> (a) All three of the Flex-A-Lite semi-flex steel fans tested completed over 50,000 cycles without any failure. By May 31, 1973, one of the Flex-A-Lite fans had been stopped after completing over 50,000 cycles without failure and the second was being tested.
>
> (b) Of two Canadian fram fans tested, the earliest failure was at 48,977 cycles.

It is thus apparent, that judged by OEM standards, Schwitzer knew at all times—before and after the contract—that the series of full flex fan models in question were defective in being unable to withstand reasonable cyclic durability testing.

Schwitzer, as disclosed by these findings, dominated the negotiations, the contract and the post contract relationship with



Flex-A-Lite. Schwitzer's dealings with Flex-A-Lite may be viewed as those between Schwitzer and one of its internal sales agencies instead of dealings with a contracting party. The contract was intended and treated by Schwitzer as an agenda, subject to redrafting, revising and disregard whenever it suited Schwitzer's needs, rather than a statement of mutual objectives, rights and duties of each of the parties thereto.

Flex-A-Lite contends that Wallace-Murray Corporation acting through Schwitzer agreed to supply fans of OEM quality and performance capability, but did not at any time intend to do so; that to the contrary it intended to supply fans of lesser quality. On August 26, 1972, Flex-A-Lite sent a letter to Schwitzer together with a signed contract. The letter stated that it was Flex-A-Lite's understanding that, "all parts will meet industry original equipment specifications; * * * that we can anticipate all parts production by the first week of October, 1972." On September 5, 1972, Schwitzer sent back the signed contract with a letter which stated:

> "There is no common original equipment specifications for fans. Each fan is designed to meet specific applications required by that OEM. You may rest assured however, that our fans are manufactured to the same quality standards as required by any of our OEMs and the performance and test requirements have been established by our engineering department based on past experience with the OEMs * * *
>
> In your Rolla visit you were advised that we would be in limited production in early October and full production by the end of the year * * *"

These letters are a part of the contract between the parties. Schwitzer intended from the start to violate this provision concerning OEM quality performance. There was a lack of candor by Schwitzer. Schwitzer had developed the line of full flex fans in question, and had initiated their sale in the aftermarket months before the contract with Flex-A-Lite was signed. Schwitzer was one of the world's largest fan manufacturers, and was accustomed to dealing with original equipment manufacturers. The evidence

reveals that it had an extensive engineering department equipped with modern testing laboratories. Schwitzer knew what standards of durability its fans were expected to equal or exceed. The results of Schwitzer's durability tests were identified, authenticated and introduced in evidence with respect to each model of the fans in question. But no Schwitzer witness would admit to knowledge of whether any given result disclosed acceptability. Schwitzer tested the fans for durability and knew the extent of their fans durability—i.e., the minimum number of cycles it was looking for. An executive of Schwitzer negotiated and executed the contact. He participated in events during the contract and was present at all major discussions before, in the execution of and during the performance of the contract. He made the decision to terminate the contract. Thus, in determining Schwitzer's intent at the time of the execution of the contract it is necessary to look to such executive's statements and actions. In his letter of September 5, 1972, which accompanied the signed contract, he, as previously noted, referred to the fact that various OEM's have differing requirements, but assured OEM quality and test requirements by reason of the experience of Schwitzer engineers with OEM requirements. On April 6, 1973, he wrote Flex-A-Lite, that, "these fans were designed to meet OEM requirements for air flow and durability. They were endurance tested accordingly. We have never agreed to make flex fans for Flex-A-Lite to any other standard." He explained in trial that the intent of his letter's statement was that Schwitzer through experience in working with OEM had developed composite specifications because there is no single industry-wide specifications and Schwitzer manufactures its fans to composite specifications. He further explained that each OEM had its own standard whether it be the manufacturer of vehicles known as Ford, Chevrolet, Pontiac or others and no two are alike. He further explained that what was meant by the statement that the fans meet OEM standards was that the fans met Schwitzer's composite standard which was designed by Schwitzer to meet OEM requirements for air flow and durability and fans so designed were endurance tested by Schwitzer. He nevertheless wrote a memorandum to Flex-A-Lite that Schwitzer would have to develop written specifications but explained in trial that such did not refer to the fans in question but that his memorandum was in answer to a request from Flex-A-Lite for help in developing specifications for aftermarket fans which would meet OEM requirements at the request of the United States Government. When pressed in trial as to why he had not sent Flex-A-Lite a copy of Schwitzer's composite OEM specifications he responded that it was "probably an oversight on my part." The contract provides in part: "Specifications and design shall be developed by Schwitzer and acceptable by Flex-A-Lite." Asked in trial if he had submitted written specifications to Flex-A-Lite, he contended that the contract did not call for submitting written specifications. Asked in trial if he had submitted specifications to Flex-A-Lite for approval, he responded:

> "In my definition for specifications in sales and marketing, yes, sir."

Asked for that definition he said:

> "Had the physical fans in their possession to look at to visualize what it could or would do on a car. They had air flow tests. I don't know what else was needed from a marketing standpoint. They had the price of course."

He professed not to know how the composite specifications were arrived at, nor what they were. This was done by engineering. Engineering witnesses from Schwitzer knew nothing of any Schwitzer composite specification, although they had ordered or supervised tests made on fans of the models manufactured for Flex-A-Lite. No reason was given for not producing another engineering witness who, records disclose, had knowledge of tests of fans being made for Flex-A-Lite and could have testified concerning the standards to which the fans for Flex-A-Lite were manufactured. No evidence was introduced to show that Schwitzer engineering was aware of any particular dura-

bility requirement in the manufacture of the fans for Flex-A-Lite. One document from Schwitzer engineering attached to an engineering department memo dated October 11, 1972, contained the following notation:

> "Comment—If these were OEM—Some would not have been released.
>
> 1 fan failed in 5,000
> 1 fan failed in 4,000
> 2 different sizes
>
> ---
>
> compared to other after market—ours look O.K."

Automobile flex fan specifications of Ford Motor Company, stipulated by the parties to have been in effect in 1972 and 1973, were introduced in evidence. These specifications required cyclic durability testing with each cycle performed as follows:

> "(a) Minimum of six fans shall be tested.
>
> (b) Mount the fan on the Cyclic Speed Fatigue Test Machine Torque Bolts To 15 lbs. Ft.
>
> (c) Cycle Fan from Zero To 6,750 RPM (± 100 RPM In 3 Seconds Maximum, Hold For 5 Seconds Minimum at 6,750 RPM, And Coast to Zero RPM And Hold For 2 Seconds Minimum."

The Ford Specifications required that 90% of the fans withstand 12,000 of such cycles, and that 50% should withstand 16,000 cycles. Chrysler in 1972 required the fan to withstand 25,000 cycles. Two test reports made by Schwitzer of fans manufactured by "Car Care" and "Auto Trend" were introduced by Flex-A-Lite. The Auto Trend report stated:

> "One cycle consisted of acceleration from 0 to 6750 RPM in 3 seconds, 6750 RPM constant speed for 2 seconds, and natural deceleration to 0 RPM in 20 seconds. Minimal acceptance on this test is usually 32,000 cycles."



The "Car Care" report was essentially the same with reference to the cycle procedure, and it also gave 32,000 cycles as the usual minimum for acceptability. While Schwitzer admitted that it issued the "Car Care" and "Auto Trend" test reports, Schwitzer disavowed 32,000 cycles as a Schwitzer composite test for OEM acceptability. No tests of production fans were initiated by Schwitzer until April 11, 1973, after Flex-A-Lite had directed that no more fans be built until the defects were corrected. These tests showed the fans as failing the Ford test, the Chrysler test, and the 32,000 cycle test by which Schwitzer judged the "Car Care" and "Auto Trend" fans. Schwitzer did not have a composite test derived from various OEM requirements by which it determined whether a fan manufactured by it was of OEM quality and endurance capability; that Schwitzer had no intention when it entered the contract with Flex-A-Lite to test the fans manufactured for Flex-A-Lite against any specific performance standard calculated to establish the fact that said fans did or did not meet OEM standards of quality; that Schwitzer entered said contract with the intent that said fans would be of less than OEM quality, but falsely represented to Flex-A-Lite that it would test the fans with procedures designed to insure that said fans would measure up to OEM quality; and that Flex-A-Lite relied upon the false representations made by Schwitzer and was injured by such reliance.

On May 31, 1973, Schwitzer pretended in a telephone conversation with Flex-A-Lite to regret not being able to make a trip to Tacoma to inspect fans and resolve differences. Schwitzer instead named dates in June upon which Flex-A-Lite could confer with Schwitzer in Indianapolis. Schwitzer did not say that it had on that date filed suit against Flex-A-Lite in the Superior Court of Marion County, Indiana (transferred to this Court). Schwitzer did file suit to recover the specific sum of $334,211.16 for fans allegedly purchased by and delivered to Flex-A-Lite, plus certain incidental and consequential damages, the exact amount of which could not then be determined. On

May 31, 1973, Schwitzer also sent written notice to Flex-A-Lite that it was "terminating" the contract for cause, citing nonpayment of invoices totalling $334,211.16 as the cause. The contract has no clause providing for immediate termination, but only provides for year-end termination without cause or termination upon 30 days advance written notice "for cause", which cause must be designated in the notice and must be a specific breach of contract by the other party. The number of fans included in the invoices upon which Schwitzer relied to justify termination and for payment of which Schwitzer filed suit totalled over 96,000 fans. Schwitzer knew that the authorized production for Flex-A-Lite through the month of April, 1973, which Schwitzer had previously acknowledged in writing was 72,900 steel flex fans, plus 10,900 other fans not here in issue, for a total authorized production of 83,800 fans. Schwitzer had previously been paid for over 4,000 fans. Under the 45 day terms of the contract, payment could not yet have been due on any fans billed after April 16, 1973. Even assuming the entire production authorized for April had been produced and billed by April 16, 1973, payment could not have been due for as many as 80,000 fans. Thus, Schwitzer's suit for payment for more than 96,000 fans was for at least 20% more fans than Schwitzer would have had any right to be paid, had Schwitzer's performance under the contract been perfect. The actual number of fans produced by Schwitzer which could have been properly billed to Flex-A-Lite by April 16, 1973, and for which payment could have been properly requested had the fans been free from defects and acceptable to Flex-A-Lite, cannot be ascertained from the evidence. Schwitzer's own production, stock control, shipping, and billing records in evidence here are in hopeless conflict. Flex-A-Lite was justified and in good faith when it made no further payments pending receipt of proper statements. The $334,211.16 claim of Schwitzer was grossly inflated and bore no rational or intelligible relationship to Flex-A-Lite's true obligation to Schwitzer. Nonpayment of that claim could not justifiably serve as cause for termination of the contract or as a basis for suit.



After filing suit Schwitzer set out to appropriate Flex-A-Lite's customers by unfair competitive practices. Schwitzer's National Aftermarket Sales Manager had already been visiting customers of Flex-A-Lite prior to termination and suit. Following termination he began full scale efforts to sell Schwitzer steel flex fans to Flex-A-Lite customers. He exhibited to potential customers "comparative performance curves" showing the air flow performance of certain Schwitzer fans as compared to certain Flex-A-Lite fans. In the absence of proper explanation these curves conveyed to potential customers the false impression that the air flow performance of Flex-A-Lite's fans was inferior to Schwitzer's fans. He deliberately used the curves to convey that unfair and false impression to customers. He knowingly caused the circulation of false and misleading statements concerning the financial condition of Flex-A-Lite. In September, 1973, he told officials of one of Flex-A-Lite's major customers, Everco, that Flex-A-Lite was not financially strong. In October, 1973, at an automotive parts trade show, he told Everco that Flex-A-Lite probably wouldn't be around much longer and that when Schwitzer's lawsuit against Flex-A-Lite was done there wouldn't be much left of Flex-A-Lite. During the same period of time, he provided the misleading performance curves (mentioned previously) to Everco and told Everco that the Flex-A-Lite fans were of inferior quality, wouldn't last, and that Everco would have serious problems with them. During the same period of time, he told Everco that Flex-A-Lite was unable to pay for fans, and because of that and Schwitzer's suit, Flex-A-Lite would be in no position to supply Everco any more fans. In October, 1974, at an automotive parts trade show, he again told Everco that Flex-A-Lite wouldn't be around much longer. In October, 1973, at an automotive parts trade show in Dallas, Texas, he stated in a conversation with Sam LaSala, Will Duncan, two sales representatives of the Schnair Organiza-

tion, and an unidentified person that Flex-A-Lite was a very small company that operated out of a sort of farmhouse in Washington, that Flex-A-Lite was funded insufficiently, that Flex-A-Lite made a product of inferior quality, that Schwitzer's tests of Flex-A-Lite's product had found it inadequate to do the job for which it was advertised, that Schwitzer's product was much better, that in time Flex-A-Lite would cease to exist, and that there wasn't a Dun and Bradstreet rating available on Flex-A-Lite. He admitted that he had said that Flex-A-Lite's supplier was for sale. He had, he said, received the word in the Schwitzer office mail. Sam LaSalle, President of LaSalle Auto Products in Long Beach, California, talked to him at the Dallas Auto Parts Show, and heard his statements concerning Flex-A-Lite as set out above. He also heard talk at the show to the effect that Flex-A-Lite's supplier was for sale; was in bad shape financially; and that that company owned the patents on Flex-A-Lite fans. Mr. Ed Gress, President of Associated Products Corporation, testified that his company had never been offered for sale nor had he authorized any one else to offer it for sale. Schwitzer had received a letter from a Seattle broker offering an unnamed fan manufacturer for sale and that he had routed it for distribution to marketing personnel of Schwitzer. Flex-A-Lite enjoyed a $300,000 line of credit at the time of the foregoing statements disparaging its ability to stay in business. The false statements decribed above were made in the presence of people engaged in the automotive parts business. Because of Schwitzer's slander of Flex-A-Lite, the President of LaSalle Auto Products in Long Beach, California, initiated inquires with a view toward buying Flex-A-Lite. Mr. Friedman, head of Everco in Chicago, warned his buyer, John Young, about buying from Flex-A-Lite, and Frigiking of Dallas sent an employee to Tacoma to view the Flex-A-Lite operation. Francis W. Bell of Balkamp, Inc., in Indianapolis, a part of the NAPA (National Auto Parts Association) heard the story that Flex-A-Lite was going broke, and called Flex-A-Lite to inquire



if it were true. Schwitzer falsely and maliciously slandered the financial stability of Flex-A-Lite with the intent to injure Flex-A-Lite, and to obtain for itself sales which would otherwise have gone to Flex-A-Lite. This business slander took two main avenues. First, that Flex-A-Lite, a make-shift operation, was going broke and could not pay its bills; its sales manager was looking for another job; and the company would not be around very long; and second, that Flex-A-Lite did not manufacture its own fans, and Associated Products Corporation, its supplier, was for sale which would leave Flex-A-Lite without a source of supply—or would at least render it questionable. Schwitzer's Aftermarket National Sales Manager personally made these slanderous statements, and another executive of Schwitzer furnished his sales department with false information concerning Associated Products Corporation being for sale. It would have been a simple matter for such executive to verify this—or prove it false—by checking directly with Associated Products Corporation before peddling it to the sales department. No such effort was made. Schwitzer has filed its answer alleging the truth of the slanderous matter. It is not necessary to determine whether the spread of the slanderous statements was furthered through re-telling by those to whom they were originally made. It was the intent of Schwitzer that such stories should gain circulation, and Schwitzer is responsible. Slander impugning the financial stability of an aftermarket supplier is particularly harmful because many customers publish their own catalogs. These customers could ill afford to devote several pages of their catalogs to a supplier's products, and then have that supplier go out of business. Where, as here, a corporation has suffered loss of business because of slander; sale and recall of defective products, and breach of contract which leaves it without products advertised in its catalog, and with a severely damaged reputation, it is impossible to accurately say what portion of the damage is attributable to the slander, as opposed to the breach of contract or the sale and recall of defective merchandise. The nature

of slander is such that the full extent of its spread, effect, or duration of that effect, can never be determined, which is why the law allows substantial damages to be awarded for malicious slander per se without proof of such damage. The Court, because of the wide circulation of the slander and because of its damaging character, finds that Flex-A-Lite has been damaged thereby in the amount of $251,088.00, to the business losses enumerated herein, which business losses are, by the Court, attributed to by Schwitzer's breach of its contract with Flex-A-Lite.

Schwitzer seeks recovery of tooling costs incurred in preparation for manufacture of the fans in question; and seeks to recover for the difference in the cost of steel allegedly purchased to perform its contract with Flex-A-Lite, and the amount received when that steel was allegedly sold as salvage. Schwitzer was actively engaged in attempting to sell the fans in question to customers in the aftermarket as early as June 21, 1972. These efforts continued to and including August 30, 1972. Schwitzer did not know on August 30, 1972 that it was going to sign the contract between Schwitzer and Flex-A-Lite. Commitments for the purchase of the tooling in question were made in June and July of 1972. In its complaint, filed on May 31, 1973, Schwitzer asks for $334,211.16, "as well as certain incidental and consequential damages in an amount not yet determined". Schwitzer has failed to establish a breach of contract by Flex-A-Lite which would entitle it to recover for its tooling costs. Schwitzer committed itself to the manufacture of the fans in question and to the purchase of tooling to accomplish such manufacture, before it knew or had reason to believe that it would enter into a contract with Flex-A-Lite to sell said fans, and that Schwitzer is still manufacturing the same series of fans with said tooling, more than two years after termination of the contract. On May 31, 1973, when Schwitzer commenced this action, it knew exactly what its tooling costs had been and were not "in an amount not yet determined". Schwitzer issued purchase orders directed to Crucible Steel Co. buying 47,700 lbs. of stainless steel in coils of six different widths. All were .015 of an inch in thickness or gauge. The purchase prices per pound were on each purchase order. Notices of shipment by Crucible Steel Co. together with certificates of test were received by Schwitzer showing the amounts shipped on the foregoing purchase orders. Schwitzer received a purchase order from D & L Steel for four different widths of steel totalling 64,802 lbs., which Schwitzer was selling to D & L Steel at 28½ cents per pound. Schwitzer's shipping documents were introduced to substantiate this sale. Thus, Schwitzer sold D & L Steel, in just four widths, 14,102 lbs. more than it was shown by its purchase orders to have purchased in all widths combined. The shipping notices of Crucible Steel Co. show only the shipping of 34,941 lbs. of steel of the dimensions sold to D & L Steel. Thus, Schwitzer's shipping notices from Crucible Steel Co. fell 29,861 lbs. short of justifying the amount sold D & L Steel. All of the steel shipped by Crucible Steel Co. was shown by both the Shipping Notices and by Certificates of Test to have been "extra FH", which means, "Extra Full Hard". The steel sold to D & L Steel is shown by its purchase order to be "Full Hard". "Extra Full Hard" stainless steel is harder that "Full Hard" steel. It is worked to attain that hardness more and would have different qualities. The invitation for bids sent out by Schwitzer offered "full hard" steel for sale. All parties involved were sophisticated in knowledge of different kinds of steel. An executive of Schwitzer in a handwritten memo of July 13, 1972, observed: "Schwitzer aftermarket fans have .014 blades. Flex-A-Lite questions if we flex a little too soon. We said we didn't think so." A metallurgical report by a Schwitzer expert finds the gauge of the metal in Schwitzer's fans which failed to be .0143. Schwitzer in its answer to count four of Flex-A-Lite's counterclaim alleges that it is still manufacturing fans identical to those made for Flex-A-Lite from metal identical in quality and dimensions. The steel sold to D & L Steel was not the steel shown by the evidence to have been purchased from Crucible

Steel Co.; the steel sold to D & L Steel was not purchased for use in making fans for Flex-A-Lite; and Schwitzer has failed to establish that it suffered any loss by reason of the purchase and sale of any steel by reason of the Flex-A-Lite contract.

Schwitzer shipped 7,696 fans which were not returned. These fans had an agreed value of $23,397.00. Flex-A-Lite paid Schwitzer the sum of $11,202.65, which, subtracted from $23,397.00 leaves a balance owing Schwitzer on the unreturned fans in the amount of $12,194.35.

Flex-A-Lite, in good faith, performed all things required by the terms of the contract to be performed by it. Flex-A-Lite enjoyed increased sales each year from 1966 to 1973. On May 31, 1973, Schwitzer commenced this action. Sales rose from $14,095.00 in 1965 to $1,816,461.00 in 1973. Its first net operating loss was sustained by Flex-A-Lite in 1973, when it lost $90,885.00. In 1974, its first complete post contract year, Flex-A-Lite's sales were down more than $300,000.00. Its second net operating loss in history was sustained in spite of cutting expenditures $225,900.00. 1975, judging from first half sales of $679,778.00, viewed from the standpoint of previous experiences, will show sales of about $1,213,456.00—down approximately another $300,000.00. In the five years preceding 1973, Flex-A-Lite averaged net operating profits of $77,200.00. Flex-A-Lite's dramatically reduced sales of 1974 and 1975 indicate that it will certainly sustain a substantial operating loss in 1975, and probable losses for several years. At the point of time covered by the evidence, Flex-A-Lite had not begun to recover from the damage done to it—rather the damage—judged by lost sales—seemed to be feeding upon itself. Without regard to loss of profits which would have been realized from the sale of Schwitzer fans, it may be fairly inferred from the evidence that had there been no contract with Schwitzer, Flex-A-Lite would have made a minimum net operating profit of $77,200.00 in each of the years 1973, 1974 and 1975—or a total for the three years of $231,600.00. Instead, the average



losses were $48,344.00 for 1973 and 1974, and it may be fairly inferred that 1975's loss will be at least as great. Thus, Flex-A-Lite's losses in 1973, 1974 and 1975 are a probable $145,032.00. This amount, added to the lost net operating profits for those years in the amount of $231,600.00, totals $376,632.00 as the amount Flex-A-Lite has been damaged during the years 1973, 1974 and 1975, without regard to the amount which would have been earned by the sale of Schwitzer produced fans. Flex-A-Lite, with proper cooperation, would have sold from 400,000 to 560,850 fans manufactured by Schwitzer in the year 1973. If Flex-A-Lite had soid 560,850 fans instead of 7,696 (sold and not returned), this would substantiate a figure of $451,039.00 as the amount of net profit Flex-A-Lite would have earned from such sales. The Court finds that the sale of 400,000 Schwitzer fans would have been made, rather than 560,850, and that Flex-A-Lite's loss in net profits was thus $322,170.00 (5/7 of $451,039.00). Flex-A-Lite suffered abnormal expenses in 1973 of $8,595.00 by reason of the failure of the Schwitzer contract. There were no losses of earnings from the failure to sell Schwitzer produced fans for the years after 1973 by reason of the fact that the contract was for a one year term with its renewal contingent upon annual agreement on prices. Flex-A-Lite should recover as compensatory damages under count one and count four of its counterclaim the total sum of $707,397.00. Flex-A-Lite should recover as compensatory damages under counts two and three of its counterclaim the total sum of $251,088.00.

That at that time and during the course of the contract, before its repudiation, Schwitzer made such false misrepresentations which were relied upon by Flex-A-Lite to its damage; and the Court finds that exemplary damages should be awarded to punish Wallace-Murray Corporation for the wrongful conduct of its Schwitzer Division; to deter it from such fraudulent conduct in the future; and to serve as an example to others who might, if Wallace-Murray Corporation were to go unpunished, be tempted

to engage in similar conduct. The Court awards exemplary damages in the amount of $150,000 to Flex-A-Lite to be paid by the Wallace-Murray Corporation concerning the wrong charged in count four of its counterclaim. The Court further finds that exemplary damages should be awarded to punish Wallace-Murray Corporation for the wrongful slanderous conduct of its Schwitzer Division; to deter it from such conduct in the future; and to serve as an example to others who might, if Wallace-Murray Corporation were to go unpunished, be tempted to engage in similar conduct. The Court awards exemplary damages in the amount of $250,000.00 to Flex-A-Lite to be paid by the Wallace-Murray Corporation concerning the wrong charged in count three of its counterclaim.

The Court has jurisdiction of the parties and subject matter of the action by reason of the amount involved in the litigation exceeding $10,000.00 and the diversity of citizenship of the parties on May 31, 1973 when the action was commenced by the plaintiff in the Superior Court of Marion County in the State of Indiana.

The plaintiff has failed to prove the essential legal elements and the alleged facts of the legal elements of count one of the complaint by a preponderance of the evidence. The law is with the defendant and against the plaintiff upon the issues of this count of complaint.

The plaintiff has failed to prove the essential legal elements and the alleged facts of the legal elements of count two of the complaint by a preponderance of the evidence. The law is with the defendant and against the plaintiff upon the issues of this count of complaint.

The plaintiff has failed to prove the essential legal elements and the alleged facts of the legal elements of count three of the complaint by a preponderance of the evidence, except that plaintiff has proved those essential legal elements and the alleged facts of the legal elements of that part of count three of the complaint by a preponderance of the evidence dealing



with the plaintiff's claim on account for the sum of $12,194.35 representing the unpaid balance of the price of $23,397.00 for 7,696 unreturned fans manufactured and sold by plaintiff at defendant's instance and request. The law is with the plaintiff and against the defendant on this count of complaint to the extent that it should recover for the unpaid portion of the price of the fans shipped by it, wheich were not returned. The law is with the defendant and against the plaintiff with respect to all other issues of this count of complaint. The plaintiff is entitled to recover from the defendant the sum of $12,194.35.

The counterclaimant has proved the essential legal elements and the alleged facts of the legal elements of count one of the counterclaim by a preponderance of the evidence. The law is with the counterclaimant and against the counterdefendant upon the issues of this count of the counterclaim.

The counterdefendant has failed to prove the essential legal elements and the alleged facts of the legal elements of the second defense of reply to count one of the counterclaim by a preponderance of the evidence. The law is with the counterclaimant and against the counterdefendant upon the issues of this defense of the reply to count one of the complaint.

The counterclaimant has proved the essential legal elements and the alleged facts of the legal elements of count two of the counterclaim by a preponderance of the evidence. The law is with the counterclaimant and against the counterdefendant upon the issue of this count of the counterclaim.

The counterdefendant has failed to prove the essential legal elements and the alleged facts of the legal elements of the second defense of reply to count two of the counterclaim by a preponderance of the evidence. The law is with the counterclaimant and against the counterdefendant upon the issues of this defense of the reply to count two of the counterclaims.

The counterdefendant has failed to prove the essential legal elements and the alleged facts of the legal elements of the third

defense of reply to count two of the counterclaim by a preponderance of the evidence. The law is with the counterclaimant and against the counterdefendant upon the issues of this defense of the reply to count two of the counterclaim.

The counterdefendant has failed to prove the essential legal elements and the alleged facts of the legal elements of the fourth defense of reply to count two of the counterclaim by a preponderance of the evidence. The law is with the counterclaimant and against the counterdefendant upon the issues of this defense of the reply to count two of the counterclaim.

The counterclaimant has proved the essential legal elements and the alleged facts of the legal elements of count three of the counterclaim by a preponderance of the evidence. The law is with the counterclaimant and against the counterdefendant upon the issues of this count of the counterclaim.

The counterdefendant has failed to prove the essential legal elements and the alleged facts of the legal elements of the second defense of reply to count three of the counterclaim by a preponderance of the evidence. The law is with the counterclaimant and against the counterdefendant upon the issues of this defense of the reply to count three of the counterclaim.

The counterdefendant has failed to prove the essential legal elements and the alleged facts of the legal elements of the third defense of reply to count three of the counterclaim by a preponderance of the evidence. The law is with the counterclaimant and against the counterdefendant upon the issues of this defense of the reply to count three of the counterclaim.

The counterdefendant has failed to prove the essential legal elements and the alleged facts of the legal elements of the fourth defense of reply to count three of the counterclaim by a preponderance of the evidence. The law is with the counterclaimant and against the counterdefendant upon the issues of this defense of the reply to count three of the counterclaim.



The counterclaimant has proved the essential legal elements and the alleged facts of the legal elements of count four of the counterclaim by a preponderance of the evidence insofar as it alleges a willful tortious breach by counterdefendant of the contract sued upon in count one of the counterclaim. The law is with the counterclaimant and against the counterdefendant upon the issues of this count of the counterclaim insofar as it alleges a willful tortious breach by counterdefendant of the contract.

The counterdefendant has failed to prove the essential legal elements and alleged facts of the legal elements of the second defense of reply to count four of the counterclaim by a preponderance of the evidence insofar as such count four of the counterclaim alleges a willful tortious breach by counterdefendant of the contract sued upon in count one of the counterclaim. The law is with the counterclaimant and against the counterdefendant upon the issues of the second defense of reply to the issues of count four of the counterclaim dealing with the alleged willful tortious breach of contract by counterdefendant.

The counterdefendant has failed to prove the essential legal elements and alleged facts of the legal elements of the third defense of reply to count four of the counterclaim by a preponderance of the evidence insofar as such count four of the counterclaim alleges a willful tortious breach by counterdefendant of the contract sued upon in count one of the counterclaim. The law is with the counterclaimant and against the counterdefendant upon the issues of the third defense of reply to the issues of count four of the counterclaim dealing with the alleged willful tortious breach of contract by counterdefendant.

The counterdefendant has failed to prove the essential legal elements and alleged facts of the legal elements of the fourth defense of reply to count four of the counterclaim by a preponderance of the evidence insofar as such count four of the counterclaim alleges a willful tortious breach by counterdefendant of the contract sued upon in count one of the counter-

claim. The law is with the counterclaimant and against the counterdefendant upon the issues of the fourth defense of reply to the issues of count four of the counterclaim dealing with the alleged willful tortious breach of contract by counterdefendant.

The counterdefendant has failed to prove the essential legal elements and alleged facts of the legal elements of the seventh defense of reply to count four of the counterclaim by a preponderance of the evidence insofar as such count four of the counterclaim alleges a willful tortious breach by counterdefendant of the contract sued upon in count one of the counterclaim. The law is with the counterclaimant and against the counterdefendant upon the issues of the seventh defense of reply to the issues of count four of the counterclaim dealing with the alleged willful tortious breach of contract by counterdefendant.

The counterdefendant has failed to prove the essential legal elements and alleged facts of the legal elements of the eighth defense of reply to count four of the counterclaim by a preponderance of the evidence insofar as such count four of the counterclaim alleges a willful tortious breach by counterdefendant of the contract sued upon in count one of the counterclaim. The law is with the counterclaimant and against the counterdefendant upon the issues of the eighth defense of reply to the issues of count four of the counterclaim dealing with the alleged willful tortious breach of contract by counterdefendant.

The counterclaimant has failed to prove the esssential legal elements and the alleged facts of the legal elements of count four of the counterclaim by a preponderance of the evidence insofar as it alleges a claim for an abuse of process in the claims of counterdefendant filed in its May 31, 1973 complaint which allegedly amounted to the willful or malicious use of process in presenting alleged fraudulent claims of breach of the August 31, 1972 contract against counterclaimant and presenting alleged fraudulent claims of damage for breach of contract against counterclaimant which process was allegedly not intended by the law to effect. Counterclaimant cannot sue for, or



recover, damages by way of counterclaim in this action for malicious prosecution, abuse of process, or any other theory predicating liability on counterdefendant's act in filing suit for losses claimed to have resulted from the purchase-sale of steel or the purchase of tooling to perform the contract regardless of how malicious or fraudulent said suit might be. Such a suit by counterclaimant would be premature inasmuch as counterdefendant's suit against counterclaimant had not been decided in counterclaimant's favor when this count of counterclaimant's action was filed. The law is with the counterdefendant and against the counterclaimant upon these issues of this count of the counterclaim.

The counterdefendant has proved the essential legal elements and the alleged facts of the legal elements of the fifth defense of reply to count four of the counterclaim by a preponderance of the evidence insofar as it alleges a claim for an abuse of process in the claims of counterdefendant filed in its May 31, 1973 complaint as amended which allegedly amounted to the willful or malicious use of process in presenting alleged fraudulent claims of breach of the August 31, 1972 contract against counterclaimant and presenting alleged fraudulent claims of damage for breach of contract against counterclaimant which process was allegedly not intended by the law to effect. The law is with the counterdefendant and against the counterclaimant upon the issues of the fifth defense of reply to the issues of count four of the counterclaim dealing with the alleged abuse of process by counterdefendant.

The counterdefendant has proved the essential legal elements and the alleged facts of the legal elements of the sixth defense of reply to count four of the counterclaim by a preponderance of the evidence insofar as it alleges a claim for an abuse of process in the claims of counterdefendant filed in its May 31, 1973 complaint as amended which allegedly amounted to the willful or malicious use of process in presenting alleged fraudulent claims of breach of the August 31, 1972 contract against

counterclaimant and presenting alleged fraudulent claims of damage for breach of contract against counterclaimant which process was allegedly not intended by the law to effect. The law is with the counterdefendant and against the counterclaimant upon the issues of the sixth defense of reply to the issues of count four of the counterclaim dealing with the alleged abuse of process by counterfedendant.

The plaintiff is entitled to recover the sum of $12,194.35 from the defendant. The counterclaimant is entitled to recover the sum of $1,107,397.00 from the counterdefendant and the costs of the action.

Dated this 14th day of October, 1976.

CALE J. HOLDER,
*Judge, United States District Court*
*Southern District of Indiana*

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## JUDGMENT

IT IS ADJUDGED that the counterclaimant recover of and from the counterdefendant the sum of $1,095,202.65 and the costs of this action.

Dated this 14th day of October, 1976.

CALE J. HOLDER,
*Judge, United States District Court*
*Southern District of Indiana*



## AGREEMENT

THIS AGREEMENT, made this date between FLEX-A-LITE CORPORATION, herein called "Flex-a-lite" and SCHWITZER DIVISION, WALLACE-MURRAY CORPORATION, herein called "Schwitzer",

WITNESSETH:

WHEREAS, Flex-a-lite has been marketing automotive and industrial engine cooling fans, primarily in the aftermarket trade, and has developed marketing and administrative organization and experience to extensively promote these products in both domestic and foreign trade, and

WHEREAS, Schwitzer has been engaged in the research, development, testing and production of automotive steel flexible blade fans for original equipment manufacturers, and it is the desire of both of the parties that subject fans be sold in the aftermarket trade to the maximum extent,

NOW, THEREFORE, in consideration of the mutual agreements herein contained and the benefits to be derived by the parties therefrom, the parties hereby agree as follows:

1. "Automotive steel flexible blade fans" will herein be referred to as "flex fans". Specifications and design shall be developed by Schwitzer and acceptable by Flex-a-lite. The blades shall have flexible pitch, varied primarily by centrifugal force and/or by fluid forces and not appurtenant control devices, such that variation of the air flow induced by the fan is not directly proportional to changes in the speed of the fan, and shall be limited to sizes generally ranging from 13 inches to 19.5 inches in diameter. This type of fan is generally referred to in the automotive industry as a fully flexible blade fan.

2. Schwitzer and Flex-a-lite hereby agrees that Flex-a-lite will act as the primary national marketing distribution system within the territory of the United States and Canada for

Schwitzer manufactured flex fans and this agreement further extends to Flex-a-lite as a secondary distributor in the same territory of automotive fans other than flex fans manufactured by Schwitzer. These other fans shall be referred to as spider fans.

3. "Aftermarket trade" shall mean sales primarily oriented to the replacement market, and shall not include original equipment manufacturers. Murray Corporation of Cockeysville, Maryland, and Eagle Parts Corporation of Ft. Worth, Texas are excluded from this agreement pending joint consummation of other arrangements.

4. Both parties agree to the timely development of promotions, administration, marketing and production requirements to accommodate marketing of between 400,000 and 560,000 units during calendar year 1973. Within one month from date of this agreement, Flex-a-lite agrees to provide Schwitzer with a blanket purchase order and an estimated delivery schedule for the calendar year 1973. Schwitzer estimates that lead time for production and delivery of initial release against this purchase order is 90 days. Lead time for delivery of subsequent releases is 30-45 days. Flex-a-lite agrees to submit releases on a monthly basis giving firm commitments for 30-45 day delivery schedule.

5. It is intended that the working arrangements of this agreement be perpetual, accordingly, each year from the date of this agreement, Flex-a-lite shall submit an annual marketing plan with preliminary estimate for the purchase of fans for the following calendar year. The plan will be jointly reviewed in August of each year and if said plan is jointly acceptable, Schwitzer agrees to sell Flex-a-lite all of its requirements for said fans during each calendar year, subject to updated terms of this agreement and at prices to be established by Schwitzer during its August annual review and subject to Flex-a-lite's ratification. Terms for payments shall be net 45 days from date of shipment, or scheduled date of shipment if finished fans are stored in Rolla at Flex-a-lite request, F.O.B. Rolla, Missouri. Schwitzer shall make shipments so as to reasonably meet delivery dates set forth by Flex-a-lite purchase orders, but shall not be liable for any failure to deliver hereunder where such failure has been occasioned by governmental acts, orders or regulations; fire; embargo, strikes; differences with workmen; failure to secure materials from usual sources of supply or any circumstances beyond Schwitzer's control not herein above enumerated, which shall prevent making deliveries in the usual course of business. Schwitzer shall not, however, be relieved from making shipment nor Flex-a-lite from accepting delivery at the agreed price when the causes interfering with deliveries shall have been removed. Schwitzer agrees to advise on any unusual delays as they may become known and will coordinate with Flex-a-lite on possible order changes that may be to mutual advantage because of these delays.



6. All marketing expenses, advertising, promotion, and unit packaging shall be the responsibility of Flex-a-lite. Flex-a-lite shall pay to Schwitzer for products furnished by Schwitzer to Flex-a-lite hereunder those prices established by quotation by Schwitzer and accepted by Flex-a-lite during annual August review, which prices will prevail during the subsequent calendar year, and will include the cost of manufacture, stamping of Flex-a-lite trade name, part number, front, Schwitzer identification, Schwitzer standard packaging and labeling suitable for bulk shipment and shipping per Flex-a-lite release instructions. Billing will include cost of any freight prepaid shipments. The current price list in effect between the parties through December 1973 is attached hereto as Schedule A. Flex-a-lite shall not obtain possession or rights in any Schwitzer trademarks, or trade names.

7. Schwitzer agrees to provide to Flex-a-lite a list of all other fans, flex and spider, by part number which Schwitzer is prepared to ship within a reasonable time after receipt of order, setting forth Schwitzer's price to Flex-a-lite, which list shall be updated periodically as necessary to keep it current and which may be relied upon by Flex-a-lite as Schwitzer's quotation re-

ferred to in the preceding paragraph, and reliance thereon by Flex-a-lite in the placing of written orders shall constitute Flex-a-lite's acceptance thereof pursuant to said preceding paragraph hereof.

8. Flex-a-lite agrees to use its best efforts to promote the sales of fans in the territory. To enable Flex-a-lite to fill orders on a timely basis for such fans in the territory, Schwitzer will provide up to 20,000 sq. ft. of warehouse space at Rolla, Missouri, for storage of bulk finished fans belonging to Flex-a-lite, until such time that this space is required for manufacturing purposes by Schwitzer.

9. The goods supplied by Schwitzer are warranted to be free of defects in material and workmanship for a period of one hundred and twenty days (120) from the date of purchase by the ultimate consumer. Schwitzer's liability under this warranty shall be limited to repair or replacement, at Schwitzer option, of any goods found to be defective by Schwitzer inspection. SCHWITZER SHALL NOT BE LIABLE FOR CONTINGENT OR CONSEQUENTIAL DAMAGES.

10. Schwitzer agrees to hold Flex-a-lite harmless against liability for any claim or damage resulting from any defect in manufacture or products produced by Schwitzer or the materials used therein. This includes any liability as a direct result of defect in design specifications or deficiency in specifications in the materials and Schwitzer shall, at its own expense, carry products liability insurance in an amount not less than $300,000 against damage arising from defects warranted against and provide Flex-a-lite with certificate of insurance protection. Inasmuch as Schwitzer has no control over the application of its fan, no liability shall inure to Schwitzer for misapplication of its products. Where possible, Schwitzer shall inform Flex-a-lite of recommended conditions of use.

11. Schwitzer agrees to defend any court action from infringement of patents brought by reason of sales and use of such fans and to indemnify Flex-a-lite or the user against any decree



or cost of such suits, provided Flex-a-lite promptly notifies Schwitzer in writing and gives Schwitzer full authority, information, control and assistance for the defense of said action.

12. Any fans manufactured by Schwitzer pursuant to this agreement which fails to conform to the specification as to design, quality of materials, quality of workmanship, or which is defective in any manner may be returned by Flex-a-lite to Schwitzer for full credit.

13. The initial working arrangement of this agreement shall continue in force until December 31, 1973. Thereafter either party hereto may terminate this agreement without cause by giving the other party written notice of the intention to terminate not less than six (6) months prior to the date fixed for termination. Either party may terminate this argeement for cause by giving to the other party written notice of intention to terminate for cause not less than thirty (30) days prior to the date designated for such termination, setting forth the cause or causes for which the terminating party desires to terminate said agreement. The term "for cause" as used herein shall mean and refer to any act or omission, or series of acts or omissions, on the part of either of the parties which the other feels makes the continuation of the relationship contemplated hereunder beyond thirty (30) days untenable, which acts or omissions or series of acts or omissions, being direct violations of specific provisions or conditions of the agreement. The above notwithstanding, in the event of a change of ownership of either party, assignment for the benefit of creditors, bankruptcy, or if a receiver or trustee of either party's property shall be appointed, either party shall have the right to cancel this agreement forthwith. All written notices given under the provisions of this paragraph shall be given to the other party by registered or certified mail.

14. Schwitzer will advise Flex-a-lite of new or additional business opportunities of which it may become aware and which is not at that time being covered by Schwitzer, Schwitzer cus-

tomers, or Flex-a-lite. In the event that the commitments reviewed and accepted at the annual August review are not met by the end of the following calendar year, Schwitzer, in addition to the other remedies recited herein, shall have the right to negotiate with other aftermarket distribution organizations under terms similar to those recited herein.

15. Any termination of this agreement shall not affect any existing order, or obligations, or other commitment incurred prior to the receipt of notice of termination.

16. Nothing herein contained shall be deemed to create in either party any right or authority to incur any obligation on the other's behalf or to bind each other in any respect whatsoever.

17. This agreement may not be changed or terminated orally, and shall be governed by and construed according to the laws of the State of Indiana and the State of Washington.

IN WITNESS WHEREOF, the parties have executed this agreement this 31st day of August, 1972.

FLEX-A-LITE CORPORATION
By /s/ EDDY D. DAVIS
*President*

SCHWITZER DIVISION
WALLACE-MURRAY CORPORATION
By /s/ CARROL G. TURK
*Vice President—Marketing*



## SCHEDULE A

### FLEX FANS

| FAL No. | Diameter | Schwitzer No. | Price | Remarks |
|---|---|---|---|---|
| 2601 | 14″ | 915770 | 3.00 | 5 Blade full flex |
| 2602 | 15″ | 915771 | 3.05 | 5/8″ Pilot |
| 2603 | 16″ | 915772 | 3.10 | 1 5/8″ 2 3/8″ BC |
| 2604 | 17″ | 915773 | 3.20 | 4 Bolt 5/16″ |
| 2605 | 18 3/8″ | 915774 | 3.35 | 2.8 PW |
| 2606 | 19½″ | 915775 | 3.50 | |
| 2607 | 17″ | 915776 | 3.85 | 7 Blade full flex |
| 2608 | 18 3/8″ | 915777 | 4.10 | 2.8 PW |
| 2609 | 19½″ | 915778 | 4.30 | |

### CLUTCH FANS

| | | | | |
|---|---|---|---|---|
| 2651 | 18″ | 912239 | 2.13 | 5 Blade 32° pitch 3 |
| 2652 | 18″ | 915595 | 2.13 | 5 Blade 32° pitch 3 |
| 2653 | 18″ | 915596 | 2.36 | 7 Blade 32° pitch 3 |
| 2654 | 18″ | 914390 | 2.36 | 7 Blade 32° pitch 3 |
| 2655 | 19½″ | 914007 | 2.49 | 7 Blade 35° pitch 3 |

### HEAVY DUTY FANS

| | | | | |
|---|---|---|---|---|
| 2661 | 15½″ | 915793 | 1.91 | 6 Blade 25° pitch |
| 2662 | 17″ | 915678 | 1.95 | 5/8″ Pilot |
| 2663 | 18″ | 915677 | 2.02 | 1 5/8″ 2 3/8″ BC 4-5/16″ Bolt |

### EXTRA HEAVY DUTY FANS

| | | | | |
|---|---|---|---|---|
| 2674 | 14″ | 915794 | 1.89 | 6 Blade 35° pitch |
| 2675 | 15½″ | 915417 | 1.91 | 5/8″ Pilot |
| 2676 | 17″ | 915416 | 1.95 | 1 5/8″ 2 3/8″ BC |
| 2677 | 18″ | 915390 | 2.02 | 4-5/16″ Bolt |

Schwitzer standard black finish, bulk packed, F.O.B. Rolla, Missouri.

(Note: Flex-A-Lite Letterhead Omitted.)

August 26, 1972

Mr. Carrol Turk
Schwitzer Division
Wallace-Murray Corporation
1125 Brookside Avenue
Indianapolis, Indiana 46206

Dear Carrol:

Having reviewed the amended agreement, as returned with your letter of August 8, followed by our August 18 phone conversation clarifying some questions, I feel that we have reached the point of joint endorsement and suggest we put the enthusiasm of our respective staffs into action.

We understand it is your intent to place Schwitzer name or logo on all parts; that all parts will meet industry original equipment specifications; that it is intended that all aftermarket accounts for the flex fans be placed into the primary distribution system; that the allotted warehousing space at Rolla will be available for at least the next two or three years; and that we can anticipate all parts production by the first week of October, 1972.

Howard has further explained the production problems related to painting in different colors, and, since it doesn't appear feasible to try for the bright blades at this time, I will not initially push for anything other than your standard black finish. However, we did refinish two of your fans in bright orange and have forwarded for your observation. I suggest that, while we go with black samples for now, we should take another look at colors at a later date.

We are awaiting performance data on assigned parts and any application data, as well as whatever competitive information that might be of interest.



Carrol, we at Flex-a-lite regard the completion of this agreement as a real red letter day for both our companies. We look for an early return of the executed copy. All signals are GO here, and we look forward to working closely and amicably together for many mutually profitable years.

Will Duncan and I will be in Chicago 28 thru 30 August, staying at the Continental Plaza. (Telephone 312 943-7200) I will conclude my part of business, hopefully, in time to swing by Rolla Wednesday afternoon, August 30. I will phone to determine if we can work out mutually convenient arrangements for the visit.

Best personal regards,

/s/ EDDY D. DAVIS
Eddy D. Davis
*President*

EDD/ds
Enclosure

(Note: Schwitzer Letterhead Omitted.)

September 5, 1972

Mr. Eddy D. Davis
President
Flex-a-lite Corporation
5915 Lake Grove Ave. S. W.
Tacoma, Washington 98499

Dear Eddy:

Enclosed you will find the completed agreement between Flex-a-lite Corporation and Schwitzer Division of Wallace-Murray Corporation.

We were very pleased that you had the opportunity to visit our Rolla fan plant with Howard Crick last week. In your letter on August 26th you raised a few questions, which I am sure were answer by Howard, but perhaps it would be well to reiterate them—

1. The Schwitzer name or loga will appear on all fans.

2. There is no common original equipment specifications for fans. Each fan is designed to meet specific applications required by that OEM. You may rest assured however, that our fans are manufactured to the same quality standards as required by any of our OEMs and the performance and test requirements have been established by our engineering department based on past experience with the OEMs.

3. It is desirable from our standpoint that you handle all automotive flex fan sales except those made to OEMs. You must bear in mind, however, that the two customers mentioned in our agreement will have an influence on how they prefer to do business. We will work together with you to simplify distribution.

4. In our meeting in your office last June, we recognized that you would be short of warehouse space to handle steel



flex fans and for this reason, offered on a temporary basis to provide up to 20,000 sq. ft. in Rolla. It must be emphasized that our Rolla facilities are a manufacturing operation and not a warehouse. For this reason, we will be using it for manufacturing just as soon as we can create the demand for our products. Therefore, we cannot give you a commitment of two or three years on this space.

5. In your Rolla visit you were advised that we would be in limited production in early October and full production by the end of the year. We anticipate no problem in meeting your build schedules.

After seeing our Rolla operation, you can understand why we have to standardize on black paint until we can find a suitable alternate based on the capabilities of our electro-fluroetic system. We will I am sure be able to reach a suitable process for painting very soon.

We are looking forward to working with your organization and have every confidence that you will be able to deliver orders to justify our agreements with you. We will of course expect to receive within the next few weeks your initial blanket order and preliminary releases, which will give us a better opportunity to meet your requirements.

I am advised that Jerry Krug is planning to meet your people in Texas very soon to see if he can get the ball rolling there.

Sincerely,

/s/ CARROL
C. G. Turk
*Vice President—Marketing*

AB
Enc.

bcc; R. J. Niehaus
H. Crick
J. Krug
S. Brong
H. Foster

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

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No. 77-1871

SCHWITZER DIVISION, WALLACE-MURRAY CORPORATION,
*Plaintiff-Appellant,*

*vs.*

FLEX-A-LITE CORPORATION,
*Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

---

No. IP 73-C-312

---

Cale J. Holder,
*Judge*

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# PETITION FOR REHEARING AND SUGGESTION OF REHEARING IN BANC

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*Attorneys for Defendant-Appellee, Flex-a-lite Corporation.*



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## PETITION FOR REHEARING AND SUGGESTION OF REHEARING IN BANC.

### Exceptional Importance of Case.

Flex-a-lite Corporation suggests the rehearing of this appeal by the Court in banc because it is of exceptional importance in the following respects:

The qualified privilege of publishing false and defamatory material accorded the press and broadcast media by *New York Times* v. *Sullivan*, 376 U. S. 254, 84 S. Ct. 710 (1964), and *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 94 S. Ct. 2997 (1974) to insure vigorous exercise by the media of the First Amendment Rights of Freedom of Speech and the Press—which might otherwise be curtailed by self-censorship were the media to be held liable in damages for falsehoods published in good faith—is extended by the Order of the panel to relieve from all liability, Schwitzer Division of Wallace-Murray Corporation, which was found by the Trial Court to have knowingly and maliciously circulated defamatory falsehoods concerning Flex-a-lite's financial condition (slander per se under Indiana law) even though no member of the media, public official, public figure or public question was involved in any way. The Order of the panel would thus wipe out a vast area of state slander law left untouched by *New York Times* v. *Sullivan, supra,* and *Gertz* v. *Robert Welch, Inc., supra.*

1. The Court's Order Erroneously Extends the Constitutional Protection Accorded the Press and Broadcast Media in Gertz v. Robert Welch, Inc., to the Private Lies Disseminated by a Corporation Trying to Destroy a Competitor by Such Defamation.

The opinion of the Supreme Court in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, is replete with language that clearly demonstrates that the Court was concerned with regulating defamations



of private persons by the media in such a way as to avoid self-censorship by the press and broadcast media—and did not intend to regulate slanders by corporations.

At p. 332 the opinion states:

> "The principal issue in this case is whether a *newspaper or broadcaster* that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements." (Emphasis supplied.)

At p. 340:

> "Our decisions recognize that a rule of strict liability that compels a *publisher or broadcaster* to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the *media* to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." (Emphasis supplied.)

At p. 341:

> *"The need to avoid self-censorship by the news media* is, however, not the only societal value at issue. . . ."

At pp. 347 and 348:

> "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a *publisher or broadcaster* of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, *yet shields the press and broadcast media* from the rigors of strict liability for defamation." (Emphasis supplied.)

At p. 350:

> "Like the doctrine of presumed damages, jury discretion to award puntitive damages unnecessarily exacerbates *the danger* of media self-censorship." (Emphasis supplied.)

The concurring and dissenting opinions in *Gertz* also evidence an understanding by the judges that only defamation by the media was under consideration with the stated goal of avoiding self-censorship by the media.

The concurring opinion of Mr. Justice Blackman at p. 354 states:

> "By removing the specters of presumed and punitive damages in the absence of New York Times malice, *the Court eliminates significant and powerful motives for self-censorship* that otherwise are present in the traditional libel action. *By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous* press." (Emphasis supplied.)

Mr. Justice Douglas, dissenting, said at p. 360:

> "It is only the hardy publisher who will engage in discussion in the face of such risk, and the Court's preoccupation with proliferating standards in the area of libel increases the risks."

Mr. Justice Brennan, in his dissent, said at p. 361:

> "I adhere to my view expressed in Rosenbloom v. Metromedia, Inc., *supra*, that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only when we require States to apply the *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), knowing-or-reckless-falsity standard in *civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.*" (Emphasis supplied.)

The dissent of Mr. Chief Justice Burger at p. 355 states:

> "I am frank to say I do not know the parameters of a 'negligence' doctrine *as applied to the news media. Conceivably this new doctrine could inhibit some editors,* as the dissents of Mr. Justice DOUGLAS and Justice BRENNAN suggest." (Emphasis supplied.)



Mr. Justice White, in his dissent, said at p. 390:

> "The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth."

Six opinions were written in Gertz, but only in the dissenting opinion of Mr. Justice White is it predicted that the rules announced in the majority opinion would be construed so as to apply to all defamations of private citizens. Mr. Chief Justice Burger said at p. 355:

> "Although I agree with much of what Mr. Justice WHITE states, I do not read the Court's new doctrinal approach in quite the same way he does."

Two years after *Gertz*, the Supreme Court, in *Time Inc.* v. *Firestone*, 424 U. S. 448, 96 S. Ct. 958 (1976) still regards *Gertz* as a strategy for avoiding media self-censorship by removing fear of libel suits. At p. 437, the Court said:

> "As to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection, see 418 U.S., at 340, 94 S.Ct., at 3007; we think GERTZ provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault."

Mr. Justice Powell, author of the *Gertz* opinion, with Mr. Justice Stewart joining, said in his concurring opinion in *Time Inc.* v. *Firestone*, 424 U. S. 448, at p. 465:

> "By requiring a showing of fault the Court in *Gertz sought to shield the press and broadcast media from a rule of strict liability that could lead to intolerable self-censorship* and at the same time recognize the legitimate state interest in compensating private individuals for wrongful injury from defamatory falseholds." (Emphasis supplied.)

Further confirmation of the fact that the Supreme Court did not intend that *Gertz* should control suits involving private business slanders, is found in *Virginia State Board of Pharmacy*

v. *Virginia Consumer Council,* 425 U. S. 748, 96 S. Ct. 1817 (1976). After holding that the State of Virginia could not prohibt the advertising of prescription drug prices, the Court said at pages 770-772:

> "Some forms of commercial speech regulation are surely permissible. *We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.*
>
> . . . Untruthful speech, commercial or otherwise, has never been protected for its own sake. (citations omitted) Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to the state's dealing effectively with this problem. *The First Amendment as we construe it today, does not prohibit the state from insuring that the stream of commercial information flow clearly as well as freely.*" (Emphasis supplied.)

A footnote to the above said in part:

> "The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. . . .
>
> Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speakers. Compare *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), with *Dun & Bradstreet Inc.* v. *Grove,* 404 U.S. 398, 92 S.Ct. 204, 30 L.Ed. 2d 175 (1971)."

In a concurring opinion in the same case, Mr. Justice Stewart said, at pages 777-778, that in the case of advertisers there is little need to sanction some falsehood in order to protect speech that matters.

It is significant that the Supreme Court two years after *Gertz* —in the footnote last quoted above—invites the reader to compare *New York Times* v. *Sullivan* with *Dun & Bradstreet* v. *Grove,* a 1971 case which refused to extend privilege status to an inadvertently false credit report. The facts and opinion of the case of *Dun & Bradstreet* v. *Grove* are found at 438 F. 2d 433 (3d Cir. 1971) (cert. denied, 404 U. S. 898, 92 S. Ct. 204 (1971).) In that decision the Court of Appeals held that the false credit report was libelous per se and would support an award of general damages without proof of special harm. The Court held that the *New York Times* "knowledge of falsity" test need not be met because Dun & Bradstreet reports are not entitled to the protection accorded the media. To the contrary, the Court held:



> ". . . Any allegations of defamation concerning such reports are properly subject to the libel laws of the several states." (p. 438.)

Though the denial of certiorari in *Dun & Bradstreet* v. *Grove* predated *Gertz* by three years, the fact that the Supreme Court —2 years after *Gertz*—should direct attention to it, in connection with the lack of need for constitutional protection of false commercial speech, certainly indicates that the Court still approves of the decision there made.

2. Under Applicable Indiana Defamation Law, Flex-A-Lite Is Entitled to Recover the Compensatory and Punitive Damages Found by the Trial Court.

The parties had stipulated that Indiana Defamation Law should apply to the case.

The Order of the Court mistakenly states that: "Indiana seems not to have decided what liability test is applicable for private defamation statements such as those in the case at bar." Footnote No. 7 of the Order says, "We have found no post-Gertz Indiana case." (Order, p. 16.)

Indiana case law on private defamation is set forth in *Wayne Works v. Hicks Body Co.,* 115 Ind. App. 10, 55 N. E. 2d 382

(1944) (before *Gertz*) quoted at p. 39 of Appellee's Brief, and *Weenig* v. *Wood*, ..... Ind. App., ....., 349 N. E. 2d 235 (1976) (Post *Gertz*).

*Wayne Works* v. *Hicks Body Co.* (1944), 115 Ind. App. 10, 55 N. E. 2d 382, states the Indiana law as follows at p. 19:

> "The letters complained of, imputing as they do that this corporate appellee was in serious financial difficulties, lacked credit, had practically suspended operations, was out of production, had made no commitments for materials for further production and would be unable to fill its orders were to the extent that they were false, libelous *pe se*, and will support an action for libel without allegation or proof of special damage." (Citations omitted.) "The injurious character of language libelous *per se* is a fact of common knowledge of which the courts take judicial notice, and general damages are presumed to result from their publication."

*Weenig* v. *Wood* (1976), ..... Ind. App. ....., 349 N. E. 2d 235—two years after *Gertz*—follows traditional Indiana defamation law:

> "In the sense that such remarks obviously impugned plaintiff in his trade or business, the statements are also defamatory *per se*." (p. 246.)

Also, at p. 246 the Court said:

> "Since we hold that the jury could have properly found Weenig's accusations to be defamatory *per se* . . . and hence actionable without proof of special damages . . . we reserve our discussion of the issues presented by Weenig's challenges. . . ."

It is respectfully submitted that inasmuch as *Gertz* does not apply to the case at bar, Indiana law is controlling. Under Indiana law Flex-a-lite is clearly entitled to both general and punitive damages.



3. The Order of the Court Erroneously Holds That the Trial Court Did Not Find "Constitutional Malice"

The Trial Court made the following finding concerning Mr. Krug, Schwitzer's national after-market sales manager:

> "He knowingly caused the circulation of false and misleading statements concerning the financial condition of Flex-a-lite."

This Court held that the foregoing language did not constitute a finding that "he" knew that the statements he caused to be circulated were in fact false.

In *Dunbar* v. *U. S.*, 156 U. S. 185, 325 S. Ct. 325 (1894) the Court said at P.P. 192 and 193 in construing an indictment:

> "It is stated in 1 Bishop Crim. Proc. (3rd ed.) Sec. 504, that the word 'knowingly' or 'well knowing' will supply the place of a positive averment that the defendant knew the fact subsequently stated 'and to like effect' are the authorities generally."

In *Moeschke* v. *State*, 14 Ind. App. 394 (1895), it was charged that the accused:

> ". . . did then and there, unlawfully, knowingly and wrongfully kill, for the purpose of selling for food, certain sick, diseased and injured animals, to wit, horses, contrary to the form of the statute." (P. 394.)

Against the contention that the charge did not show that the accused knew the animals to be sick, diseased or injured at the time they were killed, the Court said at P. 397:

> "This contention cannot be upheld . . . The adverb 'knowingly' qualifies, not only the verb did kill, but everything following the same and connected therewith, and will supply the place of a positive averment that the accused knew the facts stated subsequent to the use of said word."

Hence, inasmuch as the Trial Court *did* find that Schwitzer defamed Flex-a-lite with knowledge that its statements were

false—even under *Gertz* Flex-a-lite would have been permitted both general damages without proof of special harm, and punitive damages. Error was committed by the holding to the contrary.

4. The Court's Order at Page 16 Erred in Holding That the Trial Court Could Not and Did Not Find Actual Injury

The Order of the Court stated at P. 16:

> "In the instant case the trial court did not find actual injury and indeed it was impossible to do so."

In making this statement the Court overlooked both findings by the Trial Court and evidence in support thereof.

The Trial Court found that Flex-a-lite "suffered loss of business because of slander," (Sch. Brief, 48a), and found that "Flex-a-lite enjoyed increased sales each year from 1966 to 1973"—eight consecutive years. The defamation began in the fall of 1973. The Trial Court found that in 1974 Flex-a-lite suffered a $300,000.00 loss of sales, and in 1975 suffered an additional loss of $300,000.00 in sales.

Under Indiana law the trier of the facts may determine from the evidence whether this loss of sales was caused by the slander. In *Wayne Works* v. *Hicks Body Co.* (1944), 115 Ind. App. 10, 55 N. E. 2d 337, the Court said at P. 27:

> "It was shown among other things that for several years the appellee's gross sales had increased each year until 1940 when they decreased about $240,000 from 1939, and in 1941 they were approximately $160,000 less than 1939. Whether such a falling off in the gross business of the appellee was attributable in whole or in part to other factors as claimed by the appellant was for the jury to determine from the conflicting evidence."

Everco Industries was a substantial buyer of automobile fans. Everco's buyer testified that the Schwitzer defamations seriously concerned I. C. Friedman of Everco's board, and that he cautioned the buyer about buying from Flex-a-lite. The buyer was cautious for several months and during that time Everco found alternate sources. (Ex. FH, Pp. 60-61) Quite consistent with the directed caution, and location of other sources of supply, Everco's total purchases from Flex-a-lite were $974 in 1974, whereas in 1973 they had totalled $24,384.



Furthermore, the Court's Order is directly contrary to the holding of the Supreme Court in *Gertz*, which at P. 350 held that "actual injury" requires "no evidence which assigns an actual dollar value to the injury," and specifically mentioned damage to reputation as an item of actual injury.

Omitted from the Court's Order were the most serious of the defamations found by the Trial Court:

- Flex-a-lite a make-shift operation was going broke and could not pay its bills. (Sch. Brief 47a)
- That a Dun & Bradstreet rating on Flex-a-lite was not available. (Sch. Brief 46a)
- That Associated Products Co. owned the patents on Flex-a-lite's fans—and that Associated Products Co. was for sale. (Sch. Brief 46a)
- That Flex-a-lite was unable to pay for fans. (Sch. Brief 45a)
- That Flex-a-lite would be unable to supply Everco Industries any more fans. (Sch. Brief 45a)

Clearly the Trial Court did find actual injury justifying both compensatory and exemplary damages.

5. The Court Erred in Holding That None of Flex-A-Lite's Decline in Profitability Was Compensable.

Schwitzer conceded on appeal that it breached the contract on which it brought suit against Flex-a-lite. This Court noted the Trial Court's findings that Schwitzer breached the contract "by failing to make timely delivery, by delivering defective fans, and by shipping incorrect quantities of fans to Flex-a-lite customers".

(Order p. 3.) In addition, the Trial Court found Schwitzer had wrongly failed to provide sales samples and test samples (Sch. Brief 23a; 25a, 26a); made no good faith effort to resolve mutual problems (Sch. Brief 32a); repeatedly misrepresented and concealed its own knowledge of design and cosmetic defects (Sch. Brief 26a, 28a, 29a, 31a, 37a); and wrongly terminated the contract, sued Flex-a-lite for at least 20% more fans than could have possibly been proper had Schwitzer's performance been perfect, and set out to appropriate Flex-a-lite's customers (Sch. Brief 43a, 44a).

Flex-a-lite's sales had increased every year, regardless of business cycles, until the year after the Schwitzer debacle. Flex-a-lite made a net profit every year until 1973, when it sustained a large loss. (Ex. HI.) The losses continued, but to a lesser extent, in 1974 and the first half of 1975 (the latest period available at trial). The Trial Court attributed Flex-a-lite's loss of profitability to Schwitzer's breach of contract and slander of Flex-a-lite, stating:

> "Where, as here, a corporation has suffered loss of business because of slander; sale and recall of defective products, and breach of contract which leave it without products advertised in its catalog, and with a severely damaged reputation, it is impossible to accurately say what portion of the damage is attributable to the slander, as opposed to the breach of contract or the sale and recall of defective merchandise." (Sch. Brief 48a. Since the damage from the breach of contract could not be distinguished entirely from the damage for slander, the Court merged the compensatory damages for the two wrongs.)

The Court here says it has "searched the record in vain for any evidence that supports the finding that Flex-a-lite's decline in overall profitability was caused by Schwitzer's breach", and characterizes the evidence as showing "without contradiction events unrelated to the contract that must have contributed substantially" to the decline; loss of the Nissan account, loss of key employees, and increased costs of doing business. (Order,



pp. 5-7) In fact, the evidence supports inferences that each were related to the contract and Schwitzer misconduct.[1]

Even if events unrelated to the Schwitzer contract did contribute to Flex-a-lite's losses, the damage award is not improper. The law in Indiana has long been that damages are recoverable if they are the proximate result of the violation of the contract. *The Cincinnati & Chicago Air Line R. Co.* v. *Rodgers*, 24 Ind. 103 (1865). There may be several proximate causes attributable to a particular damage. *City of Indianapolis* v. *Bates*, 137 Ind. App. 227 (1st Div. 1965). And where two causes combine to produce injuries a party is not relieved of liability because it is responsible for only one of such causes. *Board of Commissioners of Boone County* v. *Mutchler*, 137 Ind. 140 (1894). The proximateness of damages is for the finder of fact to determine. See *Bates, supra*, at 246.

There is in fact a wealth of evidence from which it may be inferred that Flex-a-lite's losses from 1973 through 1975 were a proximate result of Schwitzer's breach. The first-in-history drop in Flex-a-lite sales is in itself evidence of the required causation under Indiana law. *Wayne Works* v. *Hicks Body Co.* (1944), 115 Ind. App. 10, 27. The record contains numerous examples of Schwitzer fans being returned to Flex-a-lite by unhappy customers because of both cosmetic and performance defects independently of the recall action. (Davis Dep. (Ex. 82), Desmond Dep. (Ex. FM), Boniffant, Kreeger Dep. (Ex. FI), also Exs. D, F, AI(1), EN, EO, FC. See also Ex. HK, showing that paint was so bad on most recalled fans Schwitzer repainted them

1. Schwitzer tried to drive Nissan away from Flex-a-lite in March 1973, contrary to the spirit of the contract. (Turk, Tr. 132-134, Ex. A) Flex-a-lite was forced to cut back its sales force in 1973 in part because Schwitzer's breaches diminished sales prospects (Driggers, Tr. 2197-2201), but there was no substantial evidence that Flex-a-lite lost business *because* of the loss of employees before that time. Promotion of the Schwitzer fans in the latter part of 1972 and early 1973 obviously entailed substantial selling expenses, helping to make them higher than in earlier or later years. Reprinting its catalog after termination of the contract occasioned increased sales literature cost of at least $26,853. (Ex. HI(2))

before attempting resale.) Young, an independent witness, confirmed the damage caused to Flex-a-lite's business reputation by having to recall the Schwitzer fans. (Ex. FH.) One would certainly expect sales of all of Flex-a-lite's products to dissatisfied customers to be harmed, and they were, as confirmed by Young, Desmond, Davis, and McGlone. In short, it is absurd to assert that *no* evidence supports a finding that Schwitzer's breach of contract was a cause of Flex-a-lite's losses.

6. The Court Erred in Holding That Flex-A-Lite Was Entitled to No Compensation for Loss of Anticipated Profits.

In reviewing the damages for loss of anticipated profits, the Court devotes most of its discussion to its conclusion that lost profits could not properly be based on Flex-a-lite's anticipated sale of 400,000 Schwitzer flex fans in 1973 (Order, 7-8).[2] Assuming, for purposes of this petition, that the Court is correct, the Court's next step is nevertheless inexplicable. Finding "no other evidence that supports . . . any other figure," the order sets aside the entire $322,170 award with no opportunity for further consideration. (Order, p. 9)

It is undisputed that Flex-a-lite *actually* sold to its customers thousands of the Schwitzer flex fans on which it would have made a profit, except that the fans had to be recalled as the direct result of Schwitzer's breach of contract.[3] What could be stronger evidence of loss of anticipated profits than to have sold Schwitzer fans only to have to take them back and return the customer's money, including Flex-a-lite's profit?

The ultimate determination of what profits Flex-a-lite would have made had Schwitzer performed properly throughout 1973, instead of delivering defective products and then suing Flex-a-lite

2. The Trial Court's damage calculation is rejected as erroneously based on a sales projection which included spider fans as well as flex fans. The Order does not explain why the miscalculation could not be corrected here or on remand.

3. Flex-a-lite purchased the fans at $3-$4 per fan. (Sch. Brief 70a). Sale price averaged about $7 per fan. (Driggers, Tr. 2213)



in May 1973, requires resolution of conflicting testimony on the number of flex fans which would have been sold, a function properly for the Trial Judge. For purposes of this petition it is sufficient to point to the testimony of Driggers, who assumed the task of straightening out the Schwitzer problems in January 1973. He testified *for Schwitzer* that he determined Flex-a-lite would sell 30,000 to 50,000 Schwitzer flex fans in 1973 (Tr. 2141).[4] All other witnesses placed the sales which Flex-a-lite would have made in 1973 at a higher level.

Thus, *all* the evidence pointed to lost profits of many thousands of dollars, and the Court erred in disallowing such damages in their entirety.

7. In Reviewing the Contract Punitive Damage Award the Court Erred in Finding No Evidence of Fraud from the Outset.

The Court ordered a $50,000 remittitur of punitive damages for lack of evidence of "fraudulent conduct in connection with the making of the contract." (Order p. 11.) In doing so, the Court disregarded detailed findings of the Trial Court, including the following:

> "At the time the contract was executed Flex-a-lite reasonably believed production quantities of Schwitzer's steel flex fans would be available in early fall 1972. In precontract negotiations Schwitzer represented that the steel flex fans had been developed and that production quantities could be expected 'in August or sooner, if we reach agreement'. By letter of September 5, 1972, which enclosed the executed contract, Schwitzer specifically advised Flex-a-lite to expect limited production of the steel flex fans in early October 1972, and full production by the end of 1972, thus assuring ample supplies of fans for delivery to Flex-a-lite's customers by the start of calendar year 1973. Schwitzer's

4. Driggers conceded that 1973 sales possibilities may well have been damaged by Schwitzer before he arrived and that he believed Flex-a-lite might sell 200,000 flex fans when he met with Turk in January 1973. (Tr. 2215-2217.)

representations were false in that Schwitzer at the time it advised Flex-a-lite that production would be underway in October, 1972, knew that some of the essential tooling required for production of its steel flex fans would not be received by it before December, 1972, and that production quantities could not reasonably be expected before January, 1973. Flex-a-lite, relying upon such false representations, signed the contract and commenced its efforts to market the fans. (Sch. Brief, 21a-22a)

* * * * *

At the time the contract was executed and the marketing goal was set, Flex-a-lite was led to believe by Schwitzer that it would furnish sales samples of each model of the steel flex fans from initial production no later than early October, 1972. . . . While failing to provide Flex-a-lite with adequate sales samples, Schwitzer offered immediate delivery of samples to another customer, Frigiking in August 1972. (Sch. Brief 23a, 24a)

Under the contract, the design and specifications of the steel flex fans were initially the responsibility of Schwitzer but were required to be acceptable to Flex-a-lite. At the time the contract was executed both parties understood that the steel flex fans would be required to meet quality standards and pass performance tests at least as rigorous as those required by original equipment manufacturers. Indeed, Schwitzer on September 5, 1972, made representations to Flex-a-lite which could only be interpreted to mean that the steel flex fans had already been found to meet or exceed such standards. At no time did Schwitzer submit written performance specifications to Flex-a-lite for approval, but instead continued to assure Flex-a-lite that the steel flex fans would meet performance standards as high as those required by any original equipment manufacturer. These false representations were relied upon by Flex-a-lite, which sold the fans in the aftermarket and then was forced to recall certain models because they did not meet OEM standards. (Sch. Brief 24a-25a)

At the time the contract was executed both parties contemplated that Flex-a-lite would test the steel flex fans to determine whether their design and specifications were



acceptable for sale in the aftermarket. Schwitzer knowingly misrepresented to Flex-a-lite that production models would be available for testing no later than early October, 1972. (Sch. Brief, 25a)

Although Schwitzer at all times represented its steel flex fans to be of original equipment quality, Schwitzer at no time had reasonable grounds, based on its own knowledge, to make such a representation, as indicated by the following facts proven at trial . . . (Sch. Brief 33a-34a, citing pre-contract cyclic durability test failures and August 1972 design flaw evidence, among other facts.)

* * * * *

It is thus apparent, that judged by OEM standards, Schwitzer knew at all times—before and after the contract—that the series of full flex fan models in question were defective in being unable to withstand reasonable cyclic durability testing. (Sch. Brief, 36a-37a)"

Evidence to support the above findings was more than substantial. Exhibits L, AZ(1)(2) and (3), CJ, Q, M, N, R, DV, AO, BA, O, HQ, 3, AT, AQ, AS, AD and AG, are all 1972 documents supporting the Court's findings concerning Schwitzer's intentions and misrepresentations at the outset of the contractual relationship. Testimony of Flex-a-lite witnesses Davis, Bonifant, and Desmond, and testimony on cross-examination of Schwitzer witnesses Turk, Edgecombe, Iden, Krug, Blair, and Spellman placed the exhibits in proper context and further substantiated the findings. The Trial Judge had the all important advantage of seeing and hearing the Schwitzer witnesses who professed good faith in the face of clear evidence to the contrary. To overlook or disregard his findings after such extensive testimony was error sufficiently serious in itself to call for rehearing.

8. To Reduce the Damages by a Million Dollars Without Opportunity for Further Consideration in the District Court Would Deprive Flex-A-Lite of a Fair Trial and Do Damage to the Integrity of the Judicial Process.

If the Trial Court's award of damages was not substantiated in some respect, the proper action on appeal would be a remand for further consideration or a new trial on damages. See *Prudential Insurance Co. of America* v. *Executive Estates, Inc.*, ..... Ind. App. ....., 369 N. E. 2d 1117, 1134 (2nd Dist. 1977), *Superwood Corporation* v. *Larson-Stang, Inc.*, 311 F. 2d 735, 742-3 (8th Cir. 1963).

Schwitzer came to this Court an admitted wrongdoer, having grossly breached its contract and slandered (at least under prior law) Flex-a-lite. If the panel's order were to remain uncorrected, Schwitzer would leave having achieved its intended result—grave damage to Flex-a-lite—at a cost which must be recognized as nominal to Schwitzer. Flex-a-lite would be left uncompensated and Schwitzer unpunished. This case would then serve not as a deterrent to misuse of power by large corporations against smaller competitors, but only as an example of successful use of the law and the judicial process to accommodate improper ends. Such a result must not be permitted. Rehearing should be ordered.

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 27, 1978

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. THOMAS R. MCMILLEN, *District Judge**

| | |
|---|---|
| SCHWITZER DIVISION, WALLACE-MURRAY CORPORATION, *Plaintiff-Counterdefendant-Appellant,* | Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. |
| No. 77-1871 *vs.* | No. IP 73-C-312 |
| FLEX-A-LITE CORPORATION, *Defendant-Counterplaintiff-Appellee.* | Cale J. Holder, *Judge.* |

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendant-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Thomas R. McMillen, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-1871

SCHWITZER DIVISION, WALLACE-MURRAY CORPORATION,
*Plaintiff-Appellant,*

*vs.*

FLEX-A-LITE CORPORATION,
*Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 73-C-312

Cale J. Holder,
*Judge.*

## MOTION TO PUBLISH AS AN OPINION THE UNPUBLISHED ORDER OF THE COURT

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## MOTION TO PUBLISH AS AN OPINION THE UNPUBLISHED ORDER OF THE COURT

Comes now, defendant-appellee, Flex-a-lite Corporation, and moves, pursuant to Rule 35(d)(3), that the unpublished Order filed in this appeal be issued as a published opinion.

Publishing said Order as an opinion is consistent with Rule 35(c), "Guidelines for Method of Disposition", in that the Order as filed establishes new rules of law for the State of Indiana and changes existing rules of law of defamation for said State in the following respect:

It has been the law of Indiana for many years that a private defamation of the financial stability of a person or corporation constitutes libel *per se*, and will support an award of general damages without proof of special harm; and if malice (in the sense of ill-will and intent to do harm) is present, will support an award of punitive damage in addition to general damages—all without proof that the offending party had knowledge that the defamation was false. Truth is an affirmative defense.

In *Wayne Works* v. *Hicks Body Co.* (1944), 115 Ind. App. 10, 55 N. E. 2d 382, the Court said at page 19:

> "The letters complained of, imputing as they do that this corporate appellee was in serious financial difficulties, lacked credit, had practically suspended operations, was out of production, had made no commitments for materials for further production and would be unable to fill its orders were, to the extent that they were false, libelous *per se*, and will support an action for libel without allegation or proof of special damage. *Maytag Co.* v. *Meadows Mfg. Co.* (1931), 45 F.(2d) 299; *N. Y. Societies, etc.* v. *McFadden Publications, et al.* (1932), 260 N. Y. 167, 183 N. E. 284, 86 A.L.R. 440. The injurious character of language libelous *per se* is a fact of common knowledge of which the courts take judicial notice, and general damages are presumed to result from their publication. *Tracy* v. *Hacket* (1898), 19 Ind. App. 133, 49 N.E. 185."

The case of *Weenig* v. *Wood* (1976), ..... Ind. App. ....., 349 N. E. 2d 235, states at page 246:

> "Since we hold that the jury could have properly found Weenig's accusations to be defamatory *per se*, see part VI A. below, and hence actionable without proof of special damages, * * * * we reserve * * * * for the section on damages * * * * our discussion of the issues presented * * * *."
>
> "In the sense that such remarks obviously impugned plaintiff in his trade or business, the statements are also defamatory *per se* * * * *."
>
> "We need not tarry long with Weenig's argument that the award of any damages to Wood is unjustified. Wood's evidence having permitted the jury to find Weenig liable for publishing communications which were defamatory *per se*, the jury could award 'general damages' for the 'harm which normally results from such a defamation.' * * * *"
>
> "Further, Woods evidence of 'actual malice' on Weenig's part permitted an award of punitive damages. *Meyer* v. *Bohlfing* (1873), 44 Ind. 238, 239-240; *Big Wheel Restaurants, Inc.* v. *Bronstein, supra,* 302 N.E.2d at 880.

The Court in *Weenig* makes it quite clear that when it says "actual malice" it is speaking of malice in the traditional sense and not "constitutional malice". This is best shown by the Court's discussion concerning Weenig's defense that his remarks were justified because true. At page 251:

> "Weenig had the burden of proof on this issue of fact since 'truth' is an affirmative defense to an action for defamation. *Hallowell* v. *Guntle* (1882) 82 Ind. 554; *Tull* v. *David* (1866), 27 Ind. 377. In this respect Weenig therefore appeals a negative judgment reversible only if contrary to law. *House* v. *Lesow* (1st Dist. 1975), Ind. App., 339 N.E.2d 86. In other words, we must find that no reasonable trier of fact could conclude other than that Weenig's accusations were true. We cannot so hold."

The Trial Court in *Weenig* had reduced an award of $150,000.00 actual damages to $25,000.00, and had reduced an



award of $50,000.00 punitive damages to $5,000.00. The Court of Appeals reversed the Trial Court and reinstated the jury's verdict on the grounds that in each case it was the jury's prerogative to determine the proper amount of damages unless such amount could be found excessive as a matter of law.

The Order of the Court in this appeal states:

> "As we have said, the trial court awarded compensatory damages on Flex-a-Lite's defamation count only upon a finding that the statements themselves had been uttered, from which the trial court presumed damages. Punitive damages were also awarded. Under *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), however, neither presumed nor punitive damages may be awarded a private defamation plaintiff unless the defamatory falsehoods were uttered with 'constitutional malice,' *i.e.*, with actual knowledge that the statements were false, or with reckless disregard of whether they were true or false." (Pages 15, 16)
>
> "The awards of presumed damages and punitive damages which the court did make cannot stand, because the court did not make adequate findings of constitutional malice." (Page 17)

Assuming, for the purpose of this motion only, that the Order correctly states the facts (which Flex-a-lite denies), it is evident that the holding of the Court is hopelessly at odds with the prevailing law of Indiana.

Unless the Order is changed on rehearing, or reversed on grant of certiorari, without publication of the Order, the bench and bar will be wholly unaware that the Indiana law of defamation has been found to be unconstitutional with reference to the doctrine of libel, per se, and punitive damages.

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 24, 1978

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. PHILIP W. TONE, *Circuit Judge*

| | |
|---|---|
| SCHWITZER DIVISION, WALLACE-MURRAY CORPORATION, *Plaintiff-Counterdefendant-Appellant,* | Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. |
| No. 77-1871 *vs.* | No. IP 73-C-312 |
| FLEX-A-LITE CORPORATION, *Defendant-Counterplaintiff-Appellee.* | Judge Cale J. Holder |

This matter comes before the court on the "MOTION TO PUBLISH AS AN OPINION THE UNPUBLISHED ORDER OF THE COURT" filed herein on October 27, 1978 by counsel for the defendant-counterplaintiff-appellee. On consideration thereof, this court being fully advised in the premises,

IT IS ORDERED that said motion be, and the same is hereby, DENIED. This court's final decision of this appeal, dated September 27, 1978, will continue to be treated as an unpublished order pursuant to Circuit Rule 35.



Rule 35. Plan for Publication of Opinions of the Seventh Circuit Promulgated Pursuant to Resolution of the Judicial Conference of the United States.

The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States:

(a) Policy. It is the policy of this circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(iii) Permitting publication by legal publishing companies as they see fit; and

(iv) Unlimited citation as precedent.

(2) Unpublished orders:

(i) Shall be typewritten and reproduced by copying machine;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with cita-

tion of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

(c) Guidelines for Method of Disposition.

(1) Published opinions:

Shall be filed in signed or per curiam form in appeals which

(i) Establish a new or change an existing rule of law;

(ii) Involve an issue of continuing public interest;

(iii) Criticize or question existing law;

(iv) Constitute a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law; or

(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which

(A) are frivolous or



(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is nonappealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

(d) Disposition is to be by Order or Opinion.

(1) The determination to dispose of an appeal by unpublished opinion shall be made by a majority of the panel rendering the decision.

(2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.

Supreme Court, U. S.
FILED
MAR 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1978

No. 78-1316

FLEX-A-LITE CORPORATION,

*Petitioner,*

v.

SCHWITZER DIVISION,
WALLACE-MURRAY CORPORATION,

*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

# Supreme Court of the United States

October Term, 1978

No. 78-1316

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FLEX-A-LITE CORPORATION,

*Petitioner,*

v.

SCHWITZER DIVISION,
WALLACE-MURRAY CORPORATION,

*Respondent.*

---

**BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

Respondent, Schwitzer Division, Wallace-Murray Corporation ("Schwitzer"), respectfully prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, filed by petitioner Flex-a-lite Corporation ("Flex-a-lite"), be denied.

## Opinions Below

The petition seeks certiorari from a unanimous, unpublished order of the Seventh Circuit which, under that Court's rules, may not be cited as a legal precedent. That order, together with the unanimous order of the Seventh Circuit denying petitioner's motion for a rehearing, and the other opinions below all appear in the Appendix to the Petition for a Writ of Certiorari filed by the petitioner.

## Jurisdiction

Jurisdiction is not contested.

## Questions Presented

1. Should the Court, in the context of this case, limit its holding in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), to apply only to media defendants?

2. Should the Court exercise its supervisory powers to review the unanimous determination of the Seventh Circuit, applying its own court rule, that the decision in this case not be published?

3. Should the Court exercise its supervisory powers to review the unanimous decision of the Seventh Circuit setting aside certain damage awards in this case which it found to be unsupported by the evidence?

## Counter-Statement of the Case

This case arose out of a dispute involving a one-year contract for the sale of automotive fans.[1] Flex-a-lite (the buyer) rejected a large number of Schwitzer's fans as allegedly defective. A40. Schwitzer brought suit seeking, *inter alia*, $334,211 for the purchase price of the fans. Flex-a-lite counterclaimed for breach of contract and slander. A2-3. In a lengthy decision, which adopted Flex-

[1] The contract is set forth at A65-A71. (All citations to page numbers preceded by the letter "A" are to the Appendix to the Petition.)



a-lite's proposed findings of fact virtually verbatim,[2] Judge Holder of the United States District Court for the Southern District of Indiana disallowed all but $12,194 of Schwitzer's claim and awarded Flex-a-lite a total of $1,107,397 in damages.

## Flex-a-lite's Contract Claim

In support of its damage award, Flex-a-lite states in its Petition (p. 5) that it enjoyed increased sales every year from 1966 through 1973—the year in which the claimed breach of contract and slander allegedly occurred. What Flex-a-lite fails to mention is that, although its sales were going up during those years, its profits were going down. The figures for 1970-1972, set forth in the Seventh Circuit opinion (at A6), are as follows:

| | 1970 | 1971 | 1972 |
|---|---|---|---|
| Sales | $1,162,186 | $1,473,619 | $1,637,755 |
| Net Operating Income | $ 139,510 | $ 79,532 | $ 49,669 |

Despite this pattern, the trial court awarded Flex-a-lite $376,632 in damages for breach of contract based on the premise that, had there been no breach, Flex-a-lite would have earned an average yearly profit of $77,200 in 1973-1975—*i.e.*, the same average profit as it had had in 1968-1972—rather than suffering an average loss in those years of $48,344.[3] In setting aside this award, the Court of Ap-

[2] The Seventh Circuit criticized the uncritical adoption of "partisan, argumentative findings composed by prevailing counsel." A3.

[3] The trial court found that Flex-a-lite had an average loss of $48,344 per year for 1973 and 1974 and it "inferred" that Flex-a-lite's loss for 1975 would be as great. *See* A4.

peals found that there was no evidence that Schwitzer's breach of contract caused the decline in Flex-a-lite's profitability. A4. In fact, such evidence as existed showed "without contradiction" that the decline was caused by events unrelated to the contract. A5.[4]

The trial court awarded another $322,170 in damages based on Flex-a-lite's anticipated profits under the Schwitzer contract. Again, the Seventh Circuit set aside the award on the ground that there was no evidence to support it.[5] In addition, the Court of Appeals found that the entire damage award for breach of contract would have been barred by Paragraph 9 of the contract—which provided that "SCHWITZER SHALL NOT BE LIABLE FOR CONTINGENT OR CONSEQUENTIAL DAMAGES" (A68)—but that the point had been waived because it was not sufficiently argued below. A7-8.[6]

The Seventh Circuit did not disturb the trial court's denial of Schwitzer's $334,211 claim for the purchase price of the fans rejected by Flex-a-lite. Flex-a-lite was thus,

[4] For example, during the period in question, Flex-a-lite lost its principal account and a number of very important employees, and its costs of doing business rose dramatically—all for reasons having nothing to do with Schwitzer. A5-6.

[5] In addition, since this award was based on the anticipated profits of a new business enterprise—the sale of flexible steel fans in the so-called "automotive aftermarket," where this product had not previously been sold—the damages were too speculative to be recoverable as a matter of Indiana law. *See, e.g., Western Gravel Road Co.* v. *Cox*, 39 Ind. 260 (1872); *Acme Cycle Co.* v. *Clarke*, 157 Ind. 271, 61 N.E. 561 (1901); and *Connersville Wagon Co.* v. *McFarlan Carriage Co.*, 166 Ind. 123, 132, 76 N.E. 294 (1905).

[6] Schwitzer also argued that Flex-a-lite was barred under UCC § 2-605 from asserting a breach of contract because it failed to respond to Schwitzer's timely request for a written statement of defects. Although the point would have been dispositive with respect to Flex-a-lite's contract claims, the Seventh Circuit relied on other grounds and consequently never reached the issue.



in effect, permitted to return the fans for full credit—which is the remedy it was supposed to have under the contract if fans manufactured by Schwitzer proved defective.[7] In addition, the Seventh Circuit left standing the trial court's award of $8,595 to Flex-a-lite for expenses incurred as a result of Schwitzer's alleged breach. Finally, even though the Seventh Circuit found that the evidence that Schwitzer had committed fraud during the performance of the contract was "not overwhelming," it allowed Flex-a-lite to recover $100,000 in punitive damages on that basis. A9.[8] Considering that Flex-a-lite's total profits for 1972 (the year prior to the alleged breach) were only $49,669, the award of $108,595 in damages—plus full credit for all allegedly defective fans which Flex-a-lite returned to Schwitzer—hardly left Flex-a-lite "uncompensated" as it asserts. *Cf.* Petition, p. 18.

### Flex-a-lite's Slander Claim

The trial court awarded $501,088 in damages based on some remarks made by a Schwitzer employee to a handful of customers in the Fall of 1973. The Court of Appeals found that, contrary to the district court's decision, some of the statements made could not, by their nature, give rise to a damage action for defamation.[9] With respect to

[7] *See* Paragraph 12 of the Agreement at A69.

[8] The Court ordered a remittitur of $50,000 from the district court's $150,000 award for punitive damages for breach of contract because it found that there was no evidence at all to support the trial court's finding that Schwitzer had committed fraud at the time of contracting.

[9] For example, statements that Flex-a-lite's fans were inferior to Schwitzer's and that Schwitzer's were better than Flex-a-lite's—which are precisely the kind of statements one would expect a sales manager to make about a competitor's products in a competitive market. *See* A11, n.4.

the remaining statements, the Seventh Circuit noted that the witnesses who had heard them "either did not believe the statements or determined that they were false; thus [their] testimony was to the effect that the statements did not harm Flex-a-lite." A14, n.8.[10] The Court of Appeals agreed with the district court that "Flex-a-lite has not shown actual injury that would support an award of compensatory damages." A13-14.

Despite the absence of actual injury, the trial court awarded Flex-a-lite $251,088 in presumed damages and $250,000 in punitive damages for defamation.[11] This result was directly contrary to this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). After noting in that case that

> "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money far in excess of any actual injury"

this Court explicitly held (418 U.S. at 349) that in libel and slander cases

> "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

[10] Flex-a-lite's suggestion that it lost the business of one customer called Everco because of the alleged slander (Petiton, p. 5, n.1) is contrary to the record. Flex-a-lite's own president testified that Flex-a-lite lost Everco as a customer because it couldn't meet its volume requirements and that the supposed slander had "nothing to do with [it]." Davis Dep., p. 74 (PX 82).

[11] The presumed damage award was made as an alternative to the breach of contract award based on Flex-a-lite's overall decline in profitability.



Since in the present case there was no evidence of knowledge of falsity or a reckless disregard for the truth, the trial court's damage award was clearly impermissible.

Although the Seventh Circuit reversed the trial court's slander award on the basis of *Gertz*, the same result would have been compelled as a matter of Indiana state law. As shown at pp. 9-10, *infra*, the Indiana cases would foreclose the award of any damages in the circumstances at bar as a matter of law. In addition, it is demonstrable that the award of presumed and punitive damages in this case was totally unjustified by the facts. The presumed damage award of $251,088 was based on the assumption that, but for the slander, Flex-a-lite would have had yearly profits of $77,200 in 1974 and 1975 instead of losses of $48,344. In fact, as indicated above, uncontradicted evidence established that Flex-a-lite's poor financial performance was due to causes having nothing to do with Schwitzer. *See* page 4, *supra*. Similarly, the $250,000 punitive damage award was made in the face of uncontradicted evidence that the employee who made the supposedly slanderous remarks was explicitly directed by Schwitzer not to say anything at all derogatory about Flex-a-lite.[12] In such circumstances, where a defendant has done everything possible to avoid an alleged tort, punitive damages are clearly inappropriate.

[12] *See* PX 31; Tr. 503-04, 740, 2545, 2580.

## Reasons for Denying the Writ of Certiorari

### I

There are a number of reasons why certiorari should not be granted in this case.

First, since the unpublished Seventh Circuit order which petitioner would have this Court review cannot be cited or used as a precedent except to support a claim of *res judicata,* collateral estoppel or law of the case (A102), the decision is, by its terms, of interest only to the parties to this litigation.

Second, while petitioner asks this Court to announce a rule of general application limiting the holding of *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), to apply only to media defendants, neither the language nor the rationale of *Gertz* supports such a limitation. As pointed out in the Restatement (Second) of Torts § 621, Comment b (Tent. Draft No. 21, 1975), "[t]he rationale [of *Gertz*] that a State has no substantial interest in securing for a plaintiff 'gratuitious awards of money damages far in excess of any actual injury' seems fully applicable to a slander action against a private defendant."

Third, the issue of whether *Gertz* should be limited to media defendants is one which has not been ruled on at all by the lower federal courts outside of this case.[13] In view of this total lack of consideration by the United States cir-

[13] *Mid-America Food Service* v. *ARA Services, Inc.,* 578 F.2d 691, 697 (8th Cir. 1978)—cited at Petition, p. 11—explicitly declined to rule on the question. *Grove* v. *Dun & Bradstreet, Inc.,* 438 F.2d 433 (3d Cir. 1971), *cert. denied,* 404 U.S. 898 (1971)—cited at Petition, p. 10—predated *Gertz* by three years. Petitioner tries to construe the citation in *Virginia State Board of Pharmacy* v. *Virginia Consumer Council,* 425 U.S. 748, 771 n.24 (1976), of



cuit and district courts, the question which petitioner would present is plainly not ripe for adjudication by this Court.

Finally, the result in the instant case would be the same regardless of whether *Gertz* is limited to media defendants or not. That is so because the presumed and punitive damages for slander which the trial court awarded are not only factually unjustifiable (*see* pp. 5-7, *supra*), but legally impermissible as a matter of Indiana state law. Contrary to the representations in Flex-a-lite's brief, Indiana law imposes a stricter constitutional standard than *Gertz* and clearly requires that the test of actual malice set forth in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), be met in cases involving non-media defendants.[14] Thus, *Aafco Heating & Air Conditioning Co.* v. *Northwest Publications, Inc.,* 162 Ind. App. 671, 321 N.E.2d 580 (Ct. App., 3d Dist., 1974), *cert. denied,* 424 U.S. 913 (1976), held that the *New York Times* standards must be satisfied to award even actual damages in defamation actions by private individuals involving subject matter of general or public interest. And *Patten* v. *Smith,* —— Ind. App. ——, 360 N.E.2d 233 (Ct. App., 3d Dist., 1977), *transfer to Indiana Supreme Court denied,* August 14, 1978, established that the same rule ap-

the denial of certiorari in *Grove* as an approval of the Third Circuit decision. Petition, pp. 10-11. However, petitioner neglects to mention that, in addition, *Virginia State Board of Pharmacy* twice cited Justice Douglas' *dissent* from the denial of certiorari in *Grove,* each time to support the proposition that commercial speech is entitled to First Amendment protection. 425 U.S. 748, 759, 765 (1976).

[14] Petitioner cites *Weenig* v. *Wood,* —— Ind. App. ——, 349 N.E.2d 235 (1976), *transfer to Indiana Supreme Court denied,* for the proposition that the *New York Times* test does not apply to a slander case between two private persons. Petition, p. 11. In actuality, the *Weenig* court merely ruled as a procedural matter that it could not consider the constitutional point because it had been raised for the first time in the defendant's reply brief on appeal. 349 N.E.2d at 247-48.

plies to commercial defamation by non-media defendants. The defendant in *Patten* was not a newspaper or a radio station, but rather a monument dealer who had attacked the quality and financial capacity of a competing cemetery venture. In that commercial, non-media context, the appellate court reversed the award of actual as well as punitive damages because the *New York Times* test of actual malice had not been met.[15] It is thus apparent that—although the Seventh Circuit did not rely on the point—Indiana law provides an independent state law basis for requiring that the *New York Times* standards be satisfied.[16] Consequently, in the context of the present case, the question as to the proposed limitation of *Gertz* which petitioner seeks to present may well be unnecessary to decide.

## II

Flex-a-lite attacks the Seventh Circuit's application of its own Rule 35 under which the Court of Appeals unanimously chose to promulgate its reversal of the trial court's judgment as an unpublished order rather than a published opinion. This type of non-outcome determinitive, housekeeping decision—which does not even affect the petitioner's interests[17]—is clearly inappropriate for certiorari.

[15] The plaintiff in *Patten* argued along the same lines as Flex-a-lite in the present case that the *New York Times* test does not apply to non-media defendants. In its Brief on Petition for Rehearing to the Indiana Court of Appeals (p. 7), it accused the court of laying down "principles applicable to other kinds of cases (media publication)" and condoning "the direct covert attack by one competitor upon another."

[16] The Seventh Circuit read the Indiana cases as requiring a showing of malice with respect to matters of "public concern." A13, n.7. It failed to consider the point that, under the *Patten* case, commercial matters are deemed to be of public concern.

[17] Flex-a-lite's interests in this case are affected only by the substance of the decision below, not by whether that decision is published or unpublished.



Seventh Circuit Rule 35 is essentially the same as similar rules in other circuits.[18] All were adopted in accordance with the recommendations of various Judicial Conferences in order to meet the universally recognized need to reduce the proliferation of published opinions. If the routine determinations of the various circuits as to whether to publish individual decisions were to be reviewed on certiorari, it would not only impose an intolerable burden on this Court but also unnecessarily interfere with the day-to-day efforts of the circuit courts to control the quantity and quality of their own published decisions.[19]

Furthermore, in this case, there is no indication that the Seventh Circuit did not correctly apply its own rule. To the contrary, it is evident that the court made a sound judgment that its ruling was so based on the unique facts of the instant case as to make publication inappropriate.[20]

[18] *See, e.g.*, Appendix B, Rules of the United States Court of Appeals for the First Circuit; Rule 18, Rules of the United States Court of Appeals for the Fourth Circuit; Appendix, Rules of the United States Court of Appeals for the Eighth Circuit; Rule 21, Rules of the United States Court of Appeals for the Ninth Circuit; Rule 17, Rules of the United States Court of Appeals for the Tenth Circuit.

[19] As noted in the report of the March 1974 Judicial Conference:

> "each circuit in its own way . . . definitely embraced the concept of eliminating publication and circulation of circuit court opinions. While the plans of each circuit generally follow the basic recommendations of the report of the Federal Judicial Center to the April 1972 meeting of the Judicial Conference, each circuit, to a limited extent, is experimenting with respect to some phases of its plan. There are in effect 11 legal laboratories accumulating experience and amending their publication plans on the basis of that experience. Because the possible rewards of such experimentation are so rich, the Conference agreed that it should not be discontinued until there is considerably more experience under the diverse circuit plans." Report of the Proceedings of the Judicial Conference of the United States, March 7-8, 1974 (at 12).

[20] Flex-a-lite's opposing argument is based in large part on supposed facts which are simply wrong. For example, as shown above,

## III

Petitioner's argument that the Seventh Circuit should not have held the trial court's findings on damages "clearly erroneous" ignores the fact that the Court of Appeals found no evidence at all to support the damage awards. A4, 6-7, 13-15. Petitioner's further argument, that in such circumstances an appellate court must order a new trial and cannot simply set aside or reduce the damage awards, is wrong as a matter of law. *See, e.g., Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670, 676-678 (10th Cir. 1977); *Agricultural Services Ass'n, Inc.* v. *Ferry-Morse Seed Co.*, 551 F.2d 1057, 1072-1073 (6th Cir. 1977). It is likewise well established that when, as here, the record in a case contains insufficient evidence to satisfy the *New York Times* standard of actual malice, a defamation award may properly be set aside without the need for a new trial. *See, e.g., Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977).

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Indiana is *not* (as the Petition, pp. 13-14, claims) "still awarding presumed and punitive damages in [defamation] cases without imposition of the *New York Times* standard of proof." *See* pp. 9-10, *supra*.



## CONCLUSION

For all the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: March 28, 1979

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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978.

**No. 78-1316**

FLEX-A-LITE CORPORATION,
*Petitioner,*

*vs.*

SCHWITZER DIVISION,
WALLACE-MURRAY CORPORATION,
*Respondent.*

## REPLY BRIEF OF PETITIONER.

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### CITATIONS.

*Cases.*


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Webb v. Utah Tour Brokers Ass'n, 568 F. 2d 670, 676-678 (10th Cir. 1977) ..... 5, 6


*Court Rule.*


Rule 35, Seventh Circuit Court of Appeals..... 4, 5

Proceeding from that point, Schwitzer misrepresents the facts and holding of *Patten* v. *Smith*, ..... Ind. App. ....., 360 N. E. 2d 233 (1977), by pretending that it was a strictly private, commercial libel case devoid of public interest aspects, and states that the Court's decision was rendered in that context.

Nothing could be further from the truth. Patten was decided on the basis that it involved a question of public interest—not on the basis of extending a qualified privilege to commercial speech.

In *Patten*, construction of a public, 72 crypt, 32 niche mausoleum was being proposed for a public cemetery in the city of Plymouth, Indiana. The city council passed a resolution which declared the construction to be in the best interest of the city. The city had entered a lease agreement which placed upon it the obligations of maintenance and entombment. The mausoleum was to be built on city land, with the city paying the expense of paving the road to the mausoleum. Patten, a monument dealer, mailed 1,500 to 2,000 brochures to Plymouth residents attacking the project.[1] The case was correctly treated as involving a matter of public concern, because of the facts related. Contrary to Schwitzer's representation in footnote 16, the Court in *Patten* did not hold or imply that "commercial matters are deemed to be of public concern."

The determinative holding of *Patten* is as follows:

> "Aafco 'requires the private individual who brings a libel action *involving an event of general or public interest* to prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false.' 321 N.E.2d at 586. *This test governs our disposition of the issues discussed below.*" (360 N. E. 2d p. 237) (Emphasis supplied.)

In its effort to convey the false impression that Indiana law requires that the *New York Times* "actual malice" test must be

1. Population of Plymouth is 7,600. Thus, a majority of homes in the city received brochures.



met in all libel and slander cases, Schwitzer also cites *Aafco Heating & Air Conditioning Co.* v. *Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N. E. 2d 580 (1976).

*Aafco* is a typical media case, full of discussion of *New York Times* v. *Sullivan, Rosenbloom* v. *Metromedia, Gertz*, etc. Concern is expressed about self-censorship by the press, and the balancing of the interest of society in freedom of press and the *"protection of the private individual's reputation when it is involved in matters of general and public concern."*

The key language which proves that the Court in *Aafco* did not intend to extend the constitutional privilege enjoyed by the press to purely private defamation cases is as follows:

> "We adopt a standard that requires the private individual who brings a libel action *involving an event of general or public interest* to prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false." (162 Ind. App. p. 679; 321 N. E. 2d p. 589) (Emphasis supplied.)
>
> "This Court believes that the subject matter test adopted in this opinion—an event or topic of general or public interest—will provide both the media and the courts with sufficient guidance as to those matters which are appropriate for public comment and thus accorded the protection of constitutional privilege." (162 Ind. App. p. 685-686; 323 N. E. 2d p. 590)

Footnote 8 in *Aafco* states:

> "Indiana law reflects the historic rule that publication in written form of statements defamatory *per se*—words which, on their face and without regard to extrinsic facts, tend to injure the reputation of another—subjects a publisher to liability although no harm to reputation is actually proved. *Indianapolis Newspapers, Inc.* v. *Fields* (1970), 254 Ind. 219, 255-56, 259 N.E.2d 651, 667-668, *cert. denied* 400 U.S. 930, 91 S.Ct. 187, 27 L.Ed.2d 190 (1970); *Gibson* v. *Kincaid* (1966), 140 Ind.App. 186, 201, 221 N.E.2d 834, 843 . . ." (162 Ind. App. p. 684; 321 N. E. 2d p. 589)

Thus, *Aafco* limits the requirement of proof of "actual malice" to communications concerning matters of general or public interest and at the same time affirms the fact that the doctrine of presumed damages, in cases involving libel *per se*, is still the law of Indiana.

It is, thus, clear that Indiana has never invoked the "actual malice" standard in a purely private defamation case. The traditional rule allowing presumed damages for libel *per se*, and punitive damages in such cases has not been disturbed. Consequently, Schwitzer's assertion that Indiana law would have prohibited recovery for slander in the case at bar without reference to *Gertz* is wholly false.

Schwitzer twice asserts that:

> "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money far in excess of any actual injury."

To the contrary, the States do have a substantial interest in protecting their citizens from having their reputations ravaged by vicious libels and slanders. Punitive damages constitute the vehicle by which the wrongdoer is punished and deterred from repeating his offense. At the same time, an example is created to deter others who would be tempted to emulate the actions of the wrongdoer, were he to go unpunished. The long recognized difficulty of proving damages stemming from libel and slander would allow the slanderer to profit from his acts were it not for punitive and presumed damages. Hence, the State does have a substantial interest in the award of damages over and above the dollar amounts which can be proved.

## II. Denial of Publication.

On page 8 of its brief, Schwitzer concedes that the case at bar is the first Federal Court decision extending *Gertz* to a non-media case. Then, on page 11, it contends that there is no indication that the Seventh Circuit did not correctly apply its Rule 35 in



denying publication. The two statements are in apparent conflict, since Rule 35(1) provides that published decisions shall be filed when they "establish a new or change an existing rule of law."

The contention that the denial of publication is not appropriate for certiorari raises the question: If the Supreme Court of the United States will not require Courts of Appeal to publish their decisions which hold unconstitutional the prevelant case law of the states comprising their circuits, how else is that necessary end to be accomplished?

## III. Disallowance of Damages Without Further Consideration on Remand.

In its Petition for Certiorari, Flex-A-Lite contends that the Seventh Circuit's elimination of virtually all its damages ($998,802 of the $1,107,397 awarded by the District Court), together with its prohibition of further proceedings on remand, was such a departure from the accepted and usual course of judicial proceedings that this Court should hear the case and determine whether that disposition was proper. Flex-A-Lite cited a number of this Court's cases to show that the accepted and usual course upon setting aside damages is to permit further findings or evidence in the Trial Court.

Schwitzer's Brief in Opposition does not really address the question of whether the Seventh Circuit's disposition of this case was such a departure from the judicial mainstream that this Court ought to review it. Schwitzer neither critizes Flex-A-Lite's citation of this Court's cases, nor cites any other Supreme Court case. Indeed, Schwitzer seems almost to concede that the Seventh Circuit's disposition here was different from the usual procedure.

Schwitzer cites three Court of Appeals cases which show, at most, that under certain circumstances, not those of this case, further proceedings are not required after damages are disallowed. *Webb* v. *Utah Tour Brokers Ass'n*, 568 F. 2d 670 (10th Cir. 1977); *Agricultural Services Ass'n Inc.* v. *Ferry-*

*Morse Seed Co.*, 551 F. 2d 1057, 1072-1073 (6th Cir. 1977); *Edwards* v. *National Audubon Society, Inc.*, 556 F. 2d 113 (2d Cir.), *cert. denied*, 434 U. S. 1002 (1977).

Schwitzer cites *Edwards* v. *National Audubon Society, Inc.* as showing that "a defamation award may properly be set aside without the need for a new trial." That case did not involve the application of a stricter malice standard on appeal than had been applied in the litigation below, and thus does not conflict with this Court's cases, cited by Flex-A-Lite at page 17 of its Petition for Certiorari, which show, that where a stricter defamation standard should have been applied, the accepted and usual course is to give plaintiff the opportunity to adduce additional proof to meet that standard.

Here, the Seventh Circuit adopted a stricter standard for slander ("actual malice") than had been applied below. Even if the Seventh Circuit correctly adopted this new standard for purely private defamation, it was wrong not to follow accepted and usual procedure, and permit further findings or evidence under the stricter standard.

The other two cases cited by Schwitzer, *Webb* v. *Utah Tour Brokers Ass'n.* and *Agricultural Services Ass'n Inc.* v. *Ferry-Morse Seed Co., supra,* both involved elements of damage as to which there was no evidence at all.

In *Webb* a new trial on damages for claimed lost profits was not required because there had been "no evidence that the plaintiffs ever made a profit, and . . . a complete dearth of evidence allowing a projection that a profit would have been made. . . ." *Webb, supra,* at 677. Similarly, *Agricultural Services Ass'n* disallowed, without retrial, the portion of a judgment awarded for loss of goodwill where ". . . the record is barren of evidence of growers becoming disillusioned with (plaintiff)." *Agricultural Services Ass'n, supra,* at 1072.

Schwitzer does not deny that the usual procedure where there was some evidence of the damages disallowed has been to permit



a new trial. Here, there was evidence tending to show damages of each type disallowed. Thus, none of the cases cited by Schwitzer justify the Seventh Circuit's refusal to follow the accepted and usual procedure, which would permit further findings or evidence, or a complete new trial.

The Seventh Circuit's failure or refusal to acknowledge the evidence is part and parcel of its erroneous decision, not a justification for it, as Schwitzer would have it. Flex-A-Lite's Petition for Rehearing, printed in the Appendix to the Petition for Certiorari at A76-A94, cites testimony, exhibits and undisputed findings of the District Court which show its decision was not "clearly erroneous". (See Points 4, 5, 6 and 7, A86-A93.)

## CONCLUSION.

In view of the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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